Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1999

JAMES H. BROWN, III
Petitioner,

v.

MICHAEL O'DEA, WARDEN,
EASTERN KENTUCKY CORRECTIONAL COMPLEX
Respondent.

On Petition For a Writ of Certiorari
to the United States Court of
Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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260 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the AEDPA standard of review applies to a petition filed after the AEDPA was enacted which contains only claims included in a pre-AEDPA petition dismissed without prejudice to permit exhaustion of state remedies?

2. If the AEDPA is applicable to this petition, whether the Nevers v. Killinger interpretation of the 28 U.S.C. §2254(d)(1) standard of review is inconsistent with the language of the AEDPA and unconstitutional under Article III and/or the Habeas Corpus Suspension Clause of Article I of the United States Constitution?

3. Regardless of the standard of review, under the circumstances of this case where the Kentucky Supreme Court split 4-3 and the district court would have granted relief on the merits of several claims, whether Brown's petition for habeas corpus should have been granted?

4. Whether the court below was required to address an issue involving prosecutorial misconduct which the district court held would have entitled petitioner to issuance of the writ if not allegedly procedurally defaulted?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 187 F.3d 572 (1999). A copy of the Opinion is included in the Appendix at A 3-64. The Opinion of the District Court for the Eastern District of Kentucky is not reported. That Court ordered entry of final judgment on September 30, 1997; judgment is included in the Appendix at A 65-66. The Court adopted the Magistrate's Report and Recommendation which is included in the Appendix at A 67-169.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on August 5, 1999. Petitioner filed a Petition for Rehearing with Suggestion for Rehearing En Banc which the United States Court of Appeals denied on October 26, 1999 (A 222-223). This Petition for Writ of Certiorari is filed within 90 days of

the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution.

Article I, Section 9, Second and Third Clauses

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28 U.S.C. §§2244(b)(1) and (d)(1)

28 U.S.C. §2254(d)

STATEMENT OF THE CASE

A. SUMMARY OF PROCEDURAL HISTORY

Petitioner James H. Brown, III was convicted of murder and sentenced to twenty years in prison in 1976. The Kentucky Supreme Court initially dismissed Brown's direct appeal after denying

pointed counsel's request for an extension of time. The appeal was reinstated after Brown sought relief from the federal courts. Smith v. Brown, 633 F.2d 213 (6th Cir. 1980) decided sub nom. Cleaver v. Bordenkircher, 634 F.2d 1010 (6th Cir. 1980) cert. denied 451 U.S. 1008 (1981). The Kentucky Supreme Court then affirmed Brown's conviction but remanded the case to the trial court for resentencing. Brown v. Commonwealth, 639 S.W.2d 758 (Ky. 1982) (A 170-186).

Brown, who had been free on appeal bond, left Kentucky and went to live in Australia for a decade as a successful, law-abiding citizen. In 1993 Brown consented to extradition to Kentucky. Brown filed a motion pursuant to Kentucky Civil Rule (CR) 60.02[1] in June 1993. The

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[1]CR 60.02(f) provides that "on motion, a court may, upon such terms as are just, relieve a party

trial court denied that motion and resentenced Brown to 20 years in prison. The Kentucky Court of Appeals affirmed the denial of CR 60.02 relief, but the Supreme Court granted discretionary review. That Court affirmed the lower court's decision in August 1996 by a 4-3 vote with three special justices sitting. Brown v. Commonwealth, 932 S.W.2d 359 (Ky. 1996) (A 187-221). Petition for rehearing was denied in November 1996.

Meanwhile, Brown in July 1994 had filed a petition for writ of habeas corpus including all issues contained in the petition which generated this appeal. Respondent requested dismissal without prejudice for failure to exhaust one ground since the CR 60.02 motion had

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or his legal representative from its final judgment, order or proceeding upon the following grounds ... any other reason of any extraordinary nature justifying relief."

contained additional information about that issue and an appeal was pending. The District Court granted that motion and the Sixth Circuit upheld denial of certificate of probable cause to appeal on January 23, 1995.

A renewed petition was filed on February 12, 1997. The District Court sua sponte found abuse of the Writ, characterizing the 1997 petition as "successive" and presuming prejudice to the Commonwealth. (A 76-86). That Court also held the petition was barred by the Anti-Terrorism and Effective Death Penalty Act (AEDPA)'s one year statute of limitations (A 87-98). However, the Court further determined that it would have granted relief based on two claims if it had not found the petition barred by the AEDPA (A 109-137). The Court also would have granted relief on a third claim if

not for the additional problem of alleged procedural default (A 149-162).

Brown appealed and O'Dea cross-appealed. The Sixth Circuit panel issued three separate opinions. All three judges agreed that the lower court had erred in finding the petition successive and barred by the AEDPA's statute of limitations (A 3-64). The majority opinion addressed only two of Brown's six claims and reversed the lower court's decision that Brown should prevail, relying on Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999) (A 19-35). One concurring opinion addressed only "fugitive disentitlement," an issue never raised prior to oral argument; that Judge implicitly concurred in the result (A 35-46). The other concurring opinion addressed and disagreed with the fugitive disentitlement argument and simply concurred in the majority opinion (A 46-

64. Brown petitioned for rehearing/ suggested rehearing en banc and requested, inter alia, that the Court address the four issues which it had not reached. His petition was denied (A 222-223).

B. SUMMARY OF FACTS

The Commonwealth's theory at Jim Brown's trial was that Jim assisted his brother Mark in killing the victim, Bryant Dudley, because the victim had stolen drugs from Mark in Maysville, Kentucky. Various witnesses testified that Mark had expressed anger at Dudley and made threats to harm Dudley and that Jim was present during some of those conversations. On a Monday night the brothers picked Dudley up and rode around; Mark questioned Dudley about the theft while holding a gun. The next night, according to various witnesses, Mark and Dudley used drugs at Mark's house; Jim was in another room and

not using drugs. Jim and Mark said they were going to Lexington and did so, arriving early the next day. Witnesses testified that Mark shot off a gun in the parking lot of the apartment complex where they were visiting to test the safety; Jim traded his boots and a shirt with one of the friends while in Lexington.

More than a week later Dudley's body was discovered in Maysville. The police made a cast of a tire track; Jim's friend turned over the shirt and boots he'd been traded. A shotgun was taken from the home of the Brown brothers' mother. There was testimony that Dudley had died from a shotgun blast. A criminalist compared the tire track cast with tires on Jim's vehicle but could not make a match. A jailhouse snitch testified that he was in jail with Jim and Mark after they were arrested and that Mark offered him one

thousand dollars to kill a witness and Jim agreed "with his head."[2]

The prosecutor called as his last witness Dr. Robert Shaler; he had read about Shaler in Playboy a few days earlier. The defense objected to Dr. Shaler's testifying at all and requested a continuance. After Dr. Shaler assured the court that his blood testing methods were absolutely reliable the court allowed him to testify and denied a continuance. Dr. Shaler tested Jim's boots, bloody clothes from Dudley's body and Jim's blood. He testified that the blood on Jim's boots could not have been Jim's and that the blood was the same type as Dudley's with only 4.6 percent of the population having that blood type.

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[2]The defense presented witnesses that this snitch was intoxicated at the time he was in jail and that such a conversation never took place.

The defense presented numerous character witnesses concerning Jim Brown, who worked in a local bank. The prosecutor gave a "probability" closing argument, urging the jury that the "odds on innocence" were more than one in a billion. During deliberations the jurors asked what they should do if they were to find Jim Brown was at the scene but did not shoot the shotgun and the Judge declined to answer that question. The jury convicted Brown of wanton murder and recommended the minimum sentence. The basis for federal jurisdiction in the district court was 28 U.S.C. §2254.

ARGUMENT

I.

THE APPLICABILITY OF THE AEDPA'S STANDARD OF REVIEW TO PETITIONS FILED PRIOR TO THE AEDPA, DISMISSED WITHOUT PREJUDICE FOR FAILURE TO EXHAUST AND RENEWED AFTER THE AEDPA IS UNRESOLVED AND HIGHLY SIGNIFICANT.

This Court has not explicitly addressed whether the AEDPA is applicable to a petition filed after enactment of the statute but containing only claims included in a pre-AEDPA petition dismissed without prejudice to permit exhaustion. Brown asserted in the courts below that the AEDPA was inapplicable to his renewed petition since the original petition, filed in 1994, contained the same claims and was dismissed without prejudice solely for failure to exhaust one claim. On July 20, 1994 when Brown filed his previous petition there was no 2254(d) standard of review. To apply the AEDPA, effective April 24, 1996, to Brown's claims which were included in his 1994 petition constitutes a denial of due process and equal protection contrary to the Fourteenth Amendment, United States Constitution. Such application also vio-

lates the ex post facto and suspension clauses, Article I, §9, United States Constitution. See In Re Hanserd, 123 F.3d 922 (6th Cir. 1997). To permit the AEDPA to apply to Brown's renewed petition would be inconsistent with both Landgraf v. USI Film Products, 511 U.S. 244 (1994) and Lindh v. Murphy, 521 U.S. 320 (1997).

This Court should grant the writ to decide this important and unresolved issue concerning the AEDPA.

II. ASSUMING AEDPA DOES APPLY TO BROWN'S RENEWED PETITION, THIS COURT SHOULD GRANT REVIEW CONCERNING THE CORRECT INTERPRETATION OF 28 USC §2254(d) SINCE THERE IS DISAGREEMENT AMONG THE CIRCUITS AND THE SIXTH CIRCUIT'S INTERPRETATION VIOLATES ARTICLE III AND THE HABEAS CORPUS SUSPENSION CLAUSE OF ARTICLE I.

This Court has granted certiorari regarding the interpretation of 28 U.S.C. §2254(d)(1). Williams v. Taylor, 119 S.Ct. 1355 (April 5, 1999), reviewing Williams

v. Taylor, 163 F.3d 860 (4th Cir. 1998). At a minimum it should hold Brown's petition in abeyance pending the decision in Williams. Alternatively the Court should grant this petition and address Nevers v. Killinger, 169 F.3d 352 (6th Cir. 1999).

In Nevers, a panel of the Sixth Circuit reviewed the rather chaotic state of the law concerning interpretation of 28 U.S.C. § 2254(d)(1). It then adopted a "blend" of the Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997) and O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998) standards:

> The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists." *Drinkard, 97 F.3d at 769,* if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as

> to indicate that it is outside the universe of plausible, credible outcomes," *O'Brien, 145 F.3d at 25.*

Nevers, 169 F.3d at 362.

Brown asserted below that the Nevers construction is unconstitutional under Article III and/or the Habeas Corpus Suspension Clause of Article I of the United States Constitution. Nevers read § 2254(d)(1) as requiring Article III courts either (1) to defer to a state court's interpretation of federal law; or (2) to decline to interpret the constitution while applying the "not debatable among reasonable jurists" standard; or (3) after providing independent review, to withhold relief sufficient to neutralize state law which the federal court has determined to be inconsistent with "the Supreme Law of the Land." Article VI, Clause 2, United States Constitution. None of those options are acceptable and the time hon-

ored decision of Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803) is compelling authority for Brown's position.

Moreover, the Nevers standard concerning a decision not being "debatable among reasonable jurists" is unworkable. In this case three of seven Justices of the Kentucky Supreme Court and the conservative district court judge all believed that Brown was denied a fair trial. Which jurists are "unreasonable" in this case? The Nevers standard is one which every petition would arguably fail to meet. The writ should issue.

III.

REGARDLESS OF THE STANDARD OF REVIEW, UNDER THE CIRCUMSTANCES OF THIS CASE WHERE THE KENTUCKY SUPREME COURT SPLIT 4-3 AND THE DISTRICT COURT WOULD HAVE GRANTED RELIEF ON THE MERITS OF SEVERAL CLAIMS FUNDAMENTAL FAIRNESS REQUIRES THAT BROWN'S PETITION FOR HABEAS CORPUS BE GRANTED.

This is an extraordinary case. For more

than 23 years. Jim Brown has asserted his innocence. Yet court after court has refused to address or disregarded his compelling constitutional claims. Brown asserts that he would never have been convicted of murder without Robert Shaler's surprise last-minute "scientific" testimony to which he vigorously objected. But Dr. Shaler was allowed to testify, Brown was denied even a short continuance so that his public defender could prepare for cross-examination and Dr. Shaler presented "mistaken" testimony to the jury. Dr. Shaler actually testified in another case that the negative results he obtained for the blood grouping factor GM 12 when he tested Brown's boots may have been false.[3] If Shaler obtained a false

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[3]While GM blood testing was accepted at the time, its application to dried blood was not. Moreover, Dr. Shaler was unaware at the time of trial that the anti-serum he used in Brown's case was weak; that same anti-serum produced false

\negative, his critical testimony to the jury - that the blood on Jim's boots could not have been Jim's - was incorrect. Three of the seven Justices of the Kentucky Supreme Court and the district judge believed that the admission of Shaler's testimony and the refusal to grant any continuance for defense counsel to prepare to cross-examine him warranted relief. Unfortunately, the panel of the Sixth Circuit did not really focus on the merits of Brown's claims.

The decision of the panel concerning the merits of Brown's claims occupies less than half of the majority opinion and makes no mention of the district court's extensive analysis of the issues (A 22-35). Significantly, the district court would have granted relief on both the Shaler testimony claim and the denial of

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results in the subsequent case.

continuance claim based on both 2254(d)(1) **and (d)(2)**. (A 104-137). The panel ignored the (d)(2) finding to which it was required to defer. Moreover, the panel's analysis of the two claims it did reach was disturbingly perfunctory. The panel apparently focused on the AEDPA and fugitive disentitlement issues to the detriment of a reasoned and thorough analysis of Brown's substantive constitutional claims.

With respect to the Shaler testimony claim, the district court viewed with caution the 1982 opinion of the Kentucky Supreme Court, noting that decision was rendered "without benefit of the new evidence recently presented by petitioner" (A 122). Analyzing the 1996 4-3 decision, the court noted that the majority affirmed denial of relief mostly because of the 1982 conclusion that circumstantial evi-

dence, excluding Shaler's testimony, was sufficient to support Brown's conviction and that Brown failed to prove the outcome of this trial would have been different and found Shaler's testimony "appears not to have been an important item of evidence." Brown, 932 S.W.2d at 362. (A 123). The state court majority characterized Brown's claim that Shaler was the key witness as:

> severely undermined by the conduct of counsel who defended appellant at trial and of the Commonwealth Attorney who prosecuted the case. Neither even referred to Dr. Shaler or his testimony in closing argument to the jury.

Id.; (A 123-124).

The district court agreed with the dissent that:

> An "aura of special reliability and trustworthiness," surrounds scientific or expert testimony in the eyes of a jury, especially within the context of a criminal trial. Hester v. Commonwealth, Ky., 734 S.W.2d 457 (1987)(citation

> omitted). Dr. Shaler positively excluded James Brown as the source of the blood stain on James Brown's suspicious boot and, as the Majority Opinion fails to mention, just as positively identified the victim, Bryant Dudley, as one of about four sources in a hundred candidates. For this jury in this trial, there were only two relevant sources of the relatively rare blood: James E. Brown III and Bryant Dudley. According to Dr. Shaler, it was impossible that the blood came from James Brown and the odds tht it came from Bryant Dudley were high. Dr. Shaler's unequivocal exclusion of James Brown as the blood source provided a compelling link connecting James Brown to the brutal murder of Bryant Dudley.

Id. at 365. In addition to the observations made by the dissent, the district court noted that "the timing of Dr. Shaler's testimony as the last witness called by the prosecutor seems to have been a strategic trial decision by the prosecutor calculated to add even greater weight to the testimony in a heavily circumstantial case." (A 125). According

to that Court:

> Dr. Shaler's testimony was not referred to in closing arguments by the defense because counsel did not want to draw attention to the damaging evidence. On the other hand, although the prosecutor did not use Dr. Shaler's name, the Kentucky court erred in stating that he did not refer to Dr. Shaler's testimony. The prosecutor in closing twice referred to the evidence of blood on Jim's boots, and clearly alluded to the expert's testimony when he referred to the fact that "one out of 25 people who had the blood that Bryant Dudley had was found on Jim Brown's boots."
>
> In addition, as noted by the dissent, the majority's conclusion that the evidence was unimportant is undermined by its previous characterization of the same evidence on direct appeal. In 1982, the state court equated Dr. Shaler's testimony regarding the blood on James Brown's boots to testimony in Mark Brown's trial that Mark Brown had admitted he killed Bryant Dudley. Brown, 639 S.W.2d at 759. "Evidence equivalent to an admission of guilt is by no means unimportant." Id. In fact, Dr. Shaler's testimony offered "the only direct evidence connecting James Brown to the murder. . .." Id. at 366; (A 125-127).

With respect to denial of a continuance so that trial counsel could prepare to cross-examine Dr. Shaler, the district court found that "was so prejudicial as to violate [Brown's] due process rights" and that "the state court's dismissal of this claim appears contrary to federal law and based on an unreasonable determination of the facts in light of the evidence presented" (A 137). Again the district court thoroughly analyzed the claim, the decision of the Kentucky Supreme Court and the relevant case law, including Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986), before reaching its conclusion (A 129-137).

Concerning the opinion of the Kentucky Supreme Court, after summarizing the facts surrounding this issue, the district court stated:

With respect to this issue, the

> Supreme Court of Kentucky indicated that it was "somewhat disturbed" by the denial of the continuance, but noted that Dr. Shaler had only been contacted by the Commonwealth on Friday, and that defense counsel had spoken to Dr. Shaler on the Saturday before trial. During that conversation, Dr. Shaler apparently indicated that he was unwilling to testify because his test results were not conclusive. T.E. 135. The state court noted that counsel was aware that Shaler might testify, but failed to move for a continuance until Shaler was called, and did not cross-examine Shaler about the doubts he had expressed in the Saturday conversation. The court concluded that petitioner was not unfairly prejudiced by the trial court's ruling, noting that overall the cross-examination was "skillful and penetrating."

(A 135-136).

That court noted these serious concerns about the Kentucky court's conclusions and held the claim was meritorious:

> As with its characterization of Dr. Shaler's testimony as unimportant, the Kentucky court's characterization of defense counsel's cross-examination as "skillful and penetrating" is somewhat suspect. Although this court has reviewed

> the cross-examination and finds it to be adequate **under the circumstances**, it is doubtful that Socrates could have conducted a "skillful and penetrating" cross-examination of this scientific witness with so little time for preparation.
>
> I agree with the Kentucky court that the trial court's refusal to grant the continuance is disturbing. In this court's experience, the testimony of such an expert in a trial in which all of the evidence is circumstantial is often given great deference by a jury.

(A 136-137).

Whatever the standard of review this Court holds applicable or adopts, James Brown should be entitled to relief because of the magnitude of the constitutional issues surrounding the testimony of Robert Shaler. The writ should issue.

IV.

THE COURT BELOW WAS REQUIRED TO ADDRESS AN ISSUE INVOLVING PROSECUTORIAL MISCONDUCT WHICH THE DISTRICT COURT HELD WOULD HAVE ENTITLED PETITIONER TO ISSUANCE OF

THE WRIT IF NOT PROCEDURALLY DEFAULTED.

The district court held that Brown's claim regarding the prosecutor's closing argument was procedurally defaulted (A 149-156). That court conceded that even respondent acknowledged that the Supreme Court of Kentucky reached the merits of this claim (A 150-152). Nonetheless, that court concluded that "the state court declined to reach the issue, and was silent as to the reason for its rejection of appellant's argument" (A 152). It opined that a conclusion of "no merit" could be based on a procedural bar. This requires an illogical reading of the Supreme Court's decision.

Moreover, Brown asserted that he is actually innocent and objected to the Magistrate's conclusion that he "has failed to demonstrate even a colorable

claim of probable actual innocence" (A 155). A federal court has the right in a case where a constitutional violation has probably resulted in the conviction of an innocent person to grant the writ even in the absence of a showing of cause and prejudice. Murray v. Carrier, 477 U.S. 478, 496 (1986).

The closing argument in this case was outrageous. The prosecutor employed a "probability" argument in which he attached random numerical values to the probability of certain things happening in Mason County. He then created ratios of possibilities **and through wild speculation** argued the "odds on innocence" as being over one in a billion.

The Commonwealth had bits and pieces of evidence which the prosecutor strung together by "testifying" during his argument as to the numerical probability

that Jim Brown was innocent - considering each piece of evidence. For example, he speculated that 1 of 20 tires sold in Mason County might be made by Uniroyal even though his own witness had testified he could not match the cast of the tire track with Jim's tires. Then he speculated that 1 of 20 people in the county drink Michelob beer (a Michelob beer can was found at the scene - no link was established to Jim) and then claimed that made "1 out of 400 chances that he is not guilty." His final item in the questionable list was the bloody boots which he claimed made the chance of innocence less than one in a billion! (A 156-159).

This type of argument was not invented for this case. It has been universally condemned by the courts, see People v. Collins, 483 P.2d 33, 36 ALR.3d 1176

(1968), as the district court noted (A 159-160). The district court explained that the prosecutor's "comments in this case were far from isolated, and were so egregious as to render the trial fundamentally unfair in violation of the due process clause" (A 161). Citing United States v. Bond, 22 F.3d 662, 667 (6th Cir. 1994) that court noted that improper remarks by a prosecutor, standing alone, would not justify reversal if a conviction was obtained in an otherwise fair manner (A 161-162). That court concluded that "[i]n light of the improper admission of Dr. Shaler's testimony and denial of the continuance, this was not an 'otherwise fair' trial." (A 162).

While the Supreme Court of Kentucky did not address the merits of the "statistics" closing argument in this case, it has found "palpable error" and reversed

another defendant's murder conviction although a comparable issue was unpreserved for appellate review. Chumbler v. Commonwealth, 905 S.W.2d 488, 494-495 (Ky. 1995). The court stated as follows:

> The calculations were completely unfounded and in error. Although there was no objection at trial, this was a "palpable error" affecting Michael's "substantial rights" resulting in "manifest injustice." RCr 10.26. The prosecutor referred to the butt as Michael's "signature" and the statistical "evidence" compounded that view. The statistical calculations rival a polygraph in their unreliability and propensity to mislead and may have convinced jurors of modest analytical ability that no one but Michael could have committed the crime. Id. at 495.

Moreover, the Sixth Circuit recently affirmed issuance of the writ based on prosecutorial misconduct at a Kentucky trial in spite of lack of objection by defense counsel. Boyle v. Million, 2000 Fed.App. 0009 P (6th Cir. January 7, 2000).

The Court did so even though the Kentucky Court of Appeals found the issue unpreserved before finding any error harmless. It relied on both Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) and Coleman v. Thompson, 501 U.S. 722, 735 (1991) in deciding to reach the merits of the claim.

The merits of this issue should have been addressed by the Sixth Circuit. See Harris v. Reed, 489 U.S. 255, 263 (1989). The writ should issue.

Respectfully submitted,

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JAMES H. BROWN, III, Petitioner-Appellant/Cross-Appellee, v. MICHAEL O'DEA, Warden, Eastern Kentucky Correctional Complex, Respondent-Appellee/Cross-Appellant.

Nos. 97-6355/97-6425

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

187 F.3D 572; 1999 U.S. App. LEXIS 18230; 1999 FED App. 0287P (6th Cir.)

August 5, 1999, Filed

SUBSEQUENT HISTORY: [**1] Rehearing En Banc Denied October 26, 1999, Reported at: *1999 U.S. App. LEXIS 28430.*

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Kentucky at Covington. No. 97-00030. William O. Bertelsman, District Judge.

DISPOSITION: REVERSED decision of district court that petition was procedurally barred. AFFIRMED decision of district court dismissing petition for writ of habeas corpus.

CORE TERMS: fugitive, disentitlement, writ of habeas corpus, continuance, flight, blood, petitioner filed, defense counsel, successive, one year, recapture, boots, effective date, surrender, custody, escaped, failure to exhaust, cross-examination, resentencing, convicted, murder, forfeiture proceeding, decision to deny, judicial system, inherent power, criminal case, direct review, affirming, invoke, join

COUNSEL: ARGUED: Gail Robinson, McNALLY & ROBINSON, Frankfort, Kentucky, for Appellant.

Todd D. Ferguson, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL APPELLATE DIVISION, Frankfort, Kentucky, for Appellee.

ON BRIEF: Gail Robinson, Kevin M. McNally, McNALLY & ROBINSON, Frankfort, Kentucky, for Appellant.

Todd D. Ferguson, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL APPELLATE DIVISION, Frankfort, Kentucky, for Appellee.

JUDGES: Before: MERRITT and MOORE, Circuit Judges: DUGGAN, *District Judge. DUGGAN, D.J., delivered the opinion of the court. MERRITT, and MOORE, JJ., delivered separate concurring opinons.

*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION:

[*574] OPINION

DUGGAN, District Judge. This matter is before the Court on petitioner's appeal [**2] from the district court's dismissal of his 28 U.S.C. §2254 petition for writ of habeas corpus. Petitioner is currently incarcerated at the Eastern Kentucky

Correctional Complex.

Petitioner filed a §2254 petition for writ of habeas corpus in the United States District Court for the Eastern District of Kentucky, challenging his conviction in Kentucky state court for murder, for which he was sentenced to twenty years imprisonment. The district court denied the petition; however, it granted a certificate of appealability so that petitioner could appeal the court's denial of the writ. This appeal ensued.

Petitioner and his brother, Mark Brown, were convicted in 1976 of the murder of Bryant Dudley. Petitioner was sentenced to twenty years imprisonment on October 15, 1976 but released on a state court bond pending appeal on October 30, 1976. On October 5, 1977, the Kentucky Supreme Court dismissed petitioner's direct appeal as untimely. On October 31, 1977, peti-

tioner filed a petition for writ of habeas corpus contending that the dismissal of his direct appeal was in error. On February 6, 1978, the district court denied petitioner's application due to [**3] his failure to exhaust his state court remedies, but retained the case on its docket pending exhaustion of those remedies.

The Kentucky Supreme Court granted petitioner's motion for a belated appeal on March 17, 1978, but dismissed it on August 22, 1978. On August 24, 1978, petitioner filed a motion to reconsider his petition for writ of habeas corpus in the district court. The state court resentenced petitioner to twenty years imprisonment on September 5, 1978. On June 27, 1979, the district court granted petitioner a conditional writ of habeas corpus, but stayed the writ for a period

of sixty days so that petitioner's appeal to the Kentucky Supreme Court could be reinstated. The district court order stated that if petitioner's appeal were not reinstated, petitioner's conviction would be set aside. This Court affirmed that judgment and the United States Supreme Court denied Brown's petition for writ of certiorari. *Brown v. Smith,* 633 F.2d 213 (6th Cir. 1980), *cert. denied,* 451 U.S. 1002 (1981).

The Kentucky Supreme Court ultimately affirmed Brown's conviction on August 31, 1982, but remanded the case to the [**4] state trial court for resentencing following a presentence investigation. Resentencing never took place, however, because Brown, who was still free on appeal bond, became a fugitive from justice in Australia for more than ten years. In January 1993, the Commonwealth

of Kentucky filed a motion for a bench warrant, which was executed by Brown's arrest in May 1993 [*575] when he was extradited. On June 23, 1993, petitioner filed a motion pursuant to Kentucky Civil Rule 60.02(f) to vacate the seventeen-year old judgment against him based upon the allegedly improper admission of expert testimony at trial. In July 1993, a state trial court denied the motion. The Kentucky Court of Appeals affirmed the trial court's denial of Brown's Rule 60.02(f) motion in December 1994. The Supreme Court of Kentucky granted discretionary review and also affirmed the trial court's decision.

On July 20, 1994, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The Commonwealth moved to dismiss the petition for failure to exhaust all available state

court proceedings on the issue of the admission of certain controversial testimony at trial. The Commonwealth [**5] noted that the appeal from the denial of petitioner's Rule 60.02(f) motion regarding this testimony was pending in the Kentucky Court of Appeals and requested that the petition be dismissed without prejudice.

On September 22, 1994, a federal magistrate judge advised the district court in a Report and Recommendation that the Commonwealth's request should be granted. The district court entered a judgment adopting the magistrate judge's report on October 18, 1994, and this Court affirmed the district court's denial of a certificate of probable cause to appeal on January 23, 1995. On November 21, 1996, all available state court proceedings were exhausted pertaining to the issue of con-

troversial testimony when the Supreme Court of Kentucky denied Brown's petition for rehearing and its earlier opinion became final.

Petitioner's current petition for writ of habeas corpus was filed on February 12, 1997. In response, the Commonwealth filed a Motion for Summary Judgment.

The district court adopted, as its decision, the Report and Recommendation of the magistrate judge in which he construed the instant petition as a second or successive petition, concluded that such a filing constituted [**6] an abuse of the writ, and recommended dismissal of the petition. Petitioner asserts two points of error with respect to the conclusions of the magistrate judge. First, petitioner contends that the district court erred in *sua sponte* dismissing the petition for abuse of the writ because the instant pe-

tition does not constitute a second or successive petition. Second, petitioner claims that the district court erred in determining that the statute of limitations in the Antiterrorism and Effective Death Penalty Act, Pub.L.No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA") is applicable to the petition. We find that the district erred in dismissing the petition on procedural grounds.

The district court construed the petition as a second or successive petition because petitioner's initial application for writ of habeas corpus filed on July 20, 1994, was dismissed without prejudice for failure to exhaust the second issue on which petitioner sought habeas relief. In *Carlson v. Pitcher*, 137 F.3d 416 (6th Cir. 1998) we addressed the proper characterization ac-

corded a second petition filed subsequent to a dismissal without prejudice for failure to [**7] exhaust.

> We join with every other court to consider the question, and hold that a *habeas* petition filed after a previous petition has been dismissed on exhaustion grounds is not a "second or successive" petition implicating the pre-filing requirement of obtaining an order of authority from the court of appeals.

Carlson, 137 F.3d at 420.

Applying the holding of *Carlson* to the instant petition, we conclude that it is not a second or successive petition. The 1994 petition was dismissed without prejudice for failure to exhaust available state remedies. Petitioner subsequently exhausted his available state remedies on November 21, 1996 when the Supreme Court of Kentucky denied his petition for rehearing. [*576] Thus, the petition is not barred as a second or successive pe-

tition.

We further find that petitioner's application is not barred by the statute of limitations contained in the AEDPA. 28 U.S.C. §2244 provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation shall run from the latest [**8] of --
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> © the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to

cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d)(1). The district court, applying 28 U.S.C. §2244(d)(1)(A), concluded that petitioner's time for direct [**9] review expired on March 21, 1983, the date on which the Supreme Court denied review of the Kentucky Supreme Court's opinion affirming petitioner's conviction. We disagree and hold that the applicable statute of limitations under the AEDPA is one year from the effective date of the AEDPA, to wit April 24, 1996.

Courts have employed several approaches

in applying the statute of limitations provisions of the AEDPA. Some courts have accepted a literal reading of the statute and applied the one-year period of limitations to all cases filed after the date of enactment of the statute. *See United States v. Smith,* 966 F.Supp. 408, 409 (E.D. Va. 1997) ("[T]he Court must measure one year from the most recent date provided by subsections (1) through (4) of Section 2255"); *Clarke v. United States,* 955 F.Supp. 593, 595 (E.D. Va. 1997). The Second Circuit has held that the Act requires petitions to be filed within a "reasonable" time following the statute's enactment, which, in some cases, may be less than one year. *See Peterson v. Demskie,* 107 F.3d 92, 93 (2d Cir. 1997) (holding that petition filed approximately one year after completion [**10] of state court direct review but within seventy-two

days after the effective date of the AEDPA was filed within "reasonable time"). A third approach, embraced by the Third and Fifth Circuits, has emerged wherein the courts determined that a "one year" grace period from the effective date of the AEDPA is applicable. *See United States v. Flores,* 135 F.3d 1000, 1006 (5th Cir. 1998); *Burns v. Morton,* 134 F.3d 109, 111-12 (3rd Cir. 1998); *Calderon v. United States Dist. Ct.,* 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied* 118 S.Ct. 899 (1998); *Duarte v. Hershberger,* 947 F.Supp. 146, 148-49 (D. N.J. 1996); *Martin v. Jones,* 969 F.Supp. 1058, 1061 (M.D. Tenn. 1997).

In *Ellis v. United States,* we determined in the context of a §2255 motion, "the reasonable time within which [petitioner] should be required to file

his motion would be within one year of the enactment of the AEDPA." *Ellis v. United States,* No. 97-2077, 1998 WL 777995, *1 (6th Cir. Oct. 21, 1998). In addition, we recently determined that a habeas petition [**11] filed on July 30, 1997, after a petitioner's conviction became [*577] final on March 2, 1993, was time-barred. *See Trice v. Toombs,* No. 98-1099, 1998 WL 808366, *2 (6th Cir. Nov. 9, 1998). Thus, we join with the Third and Fifth Circuits, and hold that a one-year grace period from the effective date of the AEDPA is applicable.

Applying the one-year rule, petitioner had one year from the effective date of the AEDPA, April 24, 1996, to file his §2254 petition. Petitioner filed the instant petition on February 12, 1997. Thus, we conclude that petitioner's application was timely filed within the

provisions of the AEDPA. We, therefore, reverse the decision of the district court in so far as it dismissed the petition on procedural grounds.

Having concluded that the petition is not a second or successive petition, and that such petition was timely filed, we will turn to a consideration of the merits of the petition. The magistrate judge determined, if the petition were not barred on procedural grounds, petitioner would be entitled to relief on two of his habeas claims. In the Report and Recommendation, the magistrate judge concluded that the admission of Dr. Shaler's [**12] testimony resulted in the denial of fundamental fairness to petitioner and the trial court's denial of a continuance deprived him of a fair trial.

Under the provisions of the AEDPA, the

district court must apply the following standard to the merits of petitioner's claim:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Recently, we had occasion to settle on the following interpretation of this standard. In *Nevers v. Killinger,* 169 F.3d 352 (6th Cir. 1999), we noted:

> [D]eference to the state courts' judgment required by the AEDPA is

> achieved [**13] by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," ..., if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes ..."

Id. at 362 (internal citations omitted). Therefore, in the Sixth Circuit, "the writ will issue if the unreasonableness of the state court's application of clearly established precedent is not debatable among jurists." *Tucker v. Prelesnik,* No. 96-73088, 1999 WL 374105, *4 (6th Cir. June 10, 1999). Under *Nevers, supra,* the application will not be debatable "if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Nevers,* 169 F.3d at 362 (citation omit-

ted).

Dr. Shaler's Testimony

The testimony at trial revealed that petitioner's brother, Mark Brown, believed that the victim, Bryant Dudley, had broken [**14] into Mark's home and stolen drugs from him. Mark Brown and petitioner took the victim for a ride on May 17, 1976. The following day petitioner and his brother were seen with the victim. On May 19, 1976, the petitioner traded his boots to a friend. Those boots were stained with Type A blood, the blood type of petitioner and the victim. A short time later, the police found the victim's body and determined [*578] that his death resulted from shotgun wounds.

The Commonwealth introduced evidence during trial linking petitioner to the

death of the victim.[5] The evidence included the expert testimony of Dr. Robert Shaler, which the Kentucky Supreme Court summarized as follows:

> [T]he blood found on Appellant's [petitioner's] boots was found in only 4.6% of the population and could not have been the blood of Appellant [petitioner]. Dr. Shaler did not testify that the blood on the boots belonged to the victim and he did not rule out the possibility that the blood stain could have been the blood of a third person.

932 S.W.2d at 361. Following petitioner's conviction, counsel for petitioner obtained an affidavit from Dr. Shaler in which he conceded:

> [A]dditional [**15] posttrial scientific research concerning the detection of genetic markers in dried blood indicates that the dried blood found on [petitioner's]

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[1]A detailed description of the evidence in this case is set forth in the two decisions from the Kentucky Supreme Court -- *Brown v. Commonwealth*, 632 S.W.2d 758 (1982) and *Brown v. Commonwealth*, 932 S.W.2d 359 (1996).

> boots indeed could have come from either [petitioner] or Dudley, and that he was mistaken when he testified that the blood could not possibly have come from [petitioner].

(Report and Recommendation at 25) (quoting *Brown v. Commonwealth,* No. 93-CA-1861-MR, p. 5 (Ct.App. 1994)). The magistrate judge further notes:

> [C]ounsel's affidavit reflects that Shaler admitted that the application of GM testing to dried blood was novel and not commonly accepted in 1976, that his testimony that the test was reliable was mistaken, and that he would not have testified had he known about the problems with the anti-sera and the technique at the time.

(*Id.* at 25-26). Petitioner contends that the trial court improperly admitted the Shaler evidence where the GM testing of dried blood did not enjoy general acceptance in the scientific community at the time of trial. (*Id.* at 23).

[**16] Habeas petitioners are not entit-

led to relief unless an error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). A petitioner will prevail where "a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law" substantially affected a jury's verdict. *O'Neal v. McAninch,* 513 U.S. 432, 436 (1995). However, we will grant federal habeas corpus relief only where a violation of a state's evidentiary rule results in the denial of fundamental fairness, and therefore, a violation of due process. *Cooper v. Sowders,* 837 F.2d 284, 287 (6th Cir. 1988). "The standard in determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness is whether the

evidence is 'material in the sense of a crucial, critical highly significant factor.'" *Leverett v. Spears*, 877 F.2d 921, 925 (11th Cir. 1989) [**17] (quoting *Redman v. Dugger*, 866 F.2d 387, 390 (11th Cir. 1989)). Even assuming the state court erred in permitting Dr. Shaler's testimony, this court will grant federal habeas relief only where the error rises to the level of a denial of fundamental fairness. *See Wright v. Dallman*, 999 F.2d 174, 178 (6th Cir. 1993).

When reviewing the Kentucky Supreme Court's decision, the magistrate judge acknowledged that the issue of whether the admission of Dr. Shaler's testimony resulted in unfairness to petitioner was "admittedly a close issue." (Report and Recommendation at 30). At the time of the magistrate judge's decision, he did not have the benefit of the Sixth Circuit's

interpretation [*579] of the AEDPA's standard governing review of habeas claims. Applying this standard, we cannot conclude that the Kentucky Supreme Court's decision that petitioner was not denied a fundamentally fair trial was "so arbitrary" as to be outside the range of "plausible outcomes."

The Supreme Court of Kentucky twice confronted the issue of the admissibility of Dr. Shaler's testimony. On direct review in 1982, the Kentucky Supreme Court found, "the only valid argument to be made [**18] against the Shaler evidence is addressable to its credibility rather than its admissibility." 639 S.W.2d at 760.[6] In

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[2]In considering the admissibility of Dr. Shaler's testimony, the Kentucky Supreme Court in its 1982 decision stated:

> It [Dr. Shaler's testimony] is not to be likened to the lie-detector test, the result of which depend heavily on the skill

discussing the evidence, the court noted that the evidence, without Dr. Shaler's testimony, "was sufficient to justify the conviction of Jim Brown ..." *Id.* In its 1996 decision affirming the Kentucky Court of Appeals' denial of petitioner's 60.02(f) motion, the Kentucky Supreme Court rejected appellant's contention that the admission of Dr. Shaler's testimony warranted any relief.

> A review of the evidence at Appellant's trial fails to convince us that the outcome would have been different if all of Dr. Shaler's testimony had been excluded or if it had been admitted and Shaler's later misgivings had been available to the jury at the time of trial.
>
> As the summary of the evidence shows there was ample circumstantial evidence in the

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of the operator, and in which factors other than truthfulness are known to affect the result. Dr. Shaler's testimony was admissible on the same basis as any other expert opinion.

Brown, 639 S.W.2d at 760.

record upon which the jury could have based its verdict. Indeed, as noted above, this Court has earlier concluded that the evidence at trial, absent the testimony of Shaler, was sufficient to convict Appellant Brown.

Brown, 932 S.W.2d at 362.

[**19] In so concluding, the Kentucky Supreme Court noted: "Dr. Shaler was subjected to intrepid and effective cross-examination by defense counsel." *Id.* During cross-examination, counsel for defense elicited from Dr. Shaler that "his particular blood analysis was novel," "that it had been accepted as expert evidence in only one other homicide case in the United States (and that case involved Dr. Shaler himself as the expert witness)," "that he did not know whether the blood found on Appellant's boots belonged to the victim," "that the blood could have belonged to a third party," and "he had conducted testing with respect to

only three blood antigens, when there are as many as 23 separate blood antigens that can be analyzed." *Id.* In light of these "admissions" on the part of Dr. Shaler, we cannot conclude that the admission of Dr. Shaler's testimony was so fundamentally unfair as to amount to a denial of due process. While admittedly Dr. Shaler's testimony was damaging to petitioner, we are not satisfied that it rises to a level of a "crucial, critical" factor in the jury's decision to convict petitioner. *See Leverett, supra.*

The jury, having heard Dr. [**20] Shaler's testimony and defense counsel's subsequent cross-examination, was free to accord it the proper weight. Further, we cannot ignore that the jury ultimately viewed Dr. Shaler's testimony in the context of the totality of the evidence adduced during the trial. Given these con-

siderations, we do not conclude that the Kentucky Supreme Court's decision that petitioner was not denied fair trial was so "arbitrary" that it was outside the realm of "plausible outcomes." Accordingly, we deny the petition on this issue.

Trial Court's Denial of a Continuance

Petitioner next argues that the trial court's denial of a continuance deprived [*580] him a fair trial. The Commonwealth called Dr. Shaler as its last witness on the second day of trial. Petitioner moved for a continuance so as to afford him the opportunity to examine Dr. Shaler's report and ascertain the validity of Dr. Shaler's conclusions. The trial court denied petitioner's motion concluding that the Commonwealth and defense counsel were equally unfamiliar with Dr. Shaler's testimony. The trial court's decision

forced defense counsel to conduct his cross-examination of Dr. Shaler only a few hours after receiving Dr. Shaler's report. [**21]

With respect to the trial court's decision to deny a continuance, we cannot say that petitioner is entitled to an issuance of the writ. "'When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process.'" *Bennett v. Scroggy*, 793 F.2d 772, 774 (6th Cir. 1986) (quoting *Hicks v. Wainwright*, 633 F.2d 2d 1146, 1148 (5th Cir. 1981)). Further, petitioner's claim that the denial of a continuance violates his due process rights must be dismissed unless the state court's determination of

his claim was, "so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *See Nevers, supra.*

The state court's adjudication of such claim is found in its analysis of petitioner's direct appeal in which it noted that it was "somewhat disturbed by the trial court's refusal to grant a continuance ..." *Brown,* 639 S.W.2d at 761. However, the Kentucky Supreme Court noted that defense counsel spoke [**22] with Dr. Shaler on Saturday before the trial commenced on Monday and at that time Dr. Shaler "indicated a hesitancy to testify, stating that his tests were inconclusive." *Id.* Although defense counsel was aware that Dr. Shaler might testify, counsel made no motion for a continuance until Dr. Shaler was called by the Commonwealth as its last witness. The court further noted

that "when presented with the opportunity during cross-examination, defense counsel failed to question Shaler about the doubts expressed in the Saturday conversation." *Id.*

We conclude that the state court's decision on this claim was not "so arbitrary" as to be implausible, and we further conclude that the failure to grant the continuance was not so prejudicial to petitioner's case as to warrant habeas relief. Defense counsel consulted with Dr. Shaler during the weekend preceding the trial and learned of Dr. Shaler's hesitancy over the results of his tests. The fact that defense counsel failed to bring this fact to the jury's attention does not merit the conclusion that the trial court's decision to deny a continuance was in error. Accordingly, we conclude that petitioner is not entitled

to habeas relief [**23] on the basis of the trial court's decision to deny a continuance.

Conclusion

For all of the foregoing reasons, we **REVERSE** the decision of the district court insofar as it concluded that the petition was procedurally barred. However, for the reasons stated herein, we **AFFIRM** the decision of the district court dismissing the petition for writ of habeas corpus.

CONCUR BY: MERRITT; MOORE

CONCUR:

MERRITT, Circuit Judege, concurring. In response to this concurring opinion on the "fugitive disentitlement doctrine," Judge Moore makes the remarkable statement that Brown's fugitive status for ten years does not have "a connection to the appellate process in this court" (4th paragraph from end of concurring opinion). Her entire

argument is based on this view of the facts. But my colleauge seems deliberately indifferent to the overriding fact that Brown would have been in jail for murder and unable to escape but for our issuance of a writ of habeas corpus in 1980. Brown's escape is the direct result of this Court's action in 1980. But for our decision, [*581] Brown would have been serving his sentence for murder when he thereafter took flight. We are directly responsible [**24] for his flight. How can it be said with a straight face in this case that Brown's flight lacks a requisite "connection with the appellate process?"

The fugitive disentitlement doctrine limits access to courts in the United States by a fugitive who has fled a criminal conviction in a court in this country. The doctrine is long-established in both the federal and state courts,

trial and appellate. The power of an American court to disentitle a fugitive from access to its power and authority is not jurisdictional in nature, *see Molinari v. New Jersey*, 396 U.lS. 365, 366 (1970) ("[S]uch [fugitive status] does not strip the case of its character as an adjudicable case or controversy ..."), nor does it implicate constitutional privileges, *see Ortego-Rodriguez v. United States*, 507 U.S. 234 (1993). Rather, the doctrine is an equitable one, *see United States v. Sharpe*, 470 U.S. 675, 681 n. 2 (1985), that rests upon the supervisory power of the federal courts to administer the federal court system, *see Goeke v. Branch*, 514 U.S. 115 (1995); [**25] *Thomas v. Arn*, 474 U.S. 140, 146 (1985).

The fugitive disentitlement doctrine was first applied in the federal courts in

Smith v. United States, 94 U.S. 97 (1876). Drawing upon earlier state cases, the Court in *Smith* removed from its docket a criminal defendant's appeal from his conviction in the Washington Territory because the defendant fled the Court's jurisdiction prior to resolution and thus was not under the control of the Court.

In *Allen v. Georgia*, 166 U.S. 138 (1897), the Supreme Court of Georgia had dismissed an appeal to it by a fugitive from a death penalty conviction. Over due process objections, the U.S. Supreme Court upheld not only the state court's dismissal of the fugitive's appeal, but also its refusal to reinstate the appeal *after* the defendant's recapture, when enforceability was no longer at issue. In preserving the dignity of the judicial process, the Court stated:

> We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. [**26] By escaping from legal custody, he has, by the laws of most, if not all, of the states, committed a distinct criminal offense; and it seems but a light punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ or error, sued out to review his conviction; otherwise he is put in a position of saying to the court: "Sustain my writ, and I will surrender myself, and take my chances upon a second trial; deny me a new trial, and I will leave the state, or forever remain in hiding." We consider this as practically a declaration of the terms uppon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.

Id. at 141. In *Molinari v. New Jersey,* 396 U.S. 365 (1970), the Court refused to adjudicate the appeal of a convicted abortionist who refused to [**27] sur-

render himself to authorities after he was released on bail. The Court stated:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

Id. at 366. In so holding, the Supreme Court in *Allen* and *Molinari* simultaneously affirmed the principles enumerated in *Smith* and *Bonahan* and expanded the role of disentitlement as a penalty for flouting the judicial system.

In 1975 the Court in *Estelle v. Dorrough,* 420 U.S. 534 (1975), confirmed the history and vitality of the doctrine and voiced still additional justifications for the fugitive disentitlement doctrine:

promoting the dignified operation of the appellate courts and deterring felony escape. In response to an equal protection claim, the Court upheld [**28] a Texas statute mandating dismissal of an appeal where the defendant has escaped while the appeal is pending. In so doing, the Court stated that the statute furthered its intended goals of discouraging escape and encouraging voluntary surrender to authorities. *See id.* at 540. Furthermore, the statute promoted "the efficient, dignified operation of the Texas Court of Criminal Appeals." *Id.* at 537.

Finally, there can be little doubt that the delay occasioned by the period of a defendant's flight from justice can significantly prejudice the prosecution should a new trial be ordered after a successful appeal. In cases where such delay is significant -- or, as in the

instant matter, so long that it would appear to make reprosecution very difficult, if not impossible -- "[i]t would be unconscionable to allow such a defendant to benefit from the delay by forcing the government to reprosecute him long after memories have dimmed and evidence has been lost." *United States v. Persico,* 853 F.2d 134, 137 (2d Cir. 1988). We recently applied this same principle in *United States v. Lanier,* 123 F.3d 945 (6th Cir. 1997), [**29] even though the defendant remained a fugitive for only a few months and the evidence from the original trial had not grown stale.

As in the *Lanier* case, Petitioner Brown's conduct in the instant matter exemplifies the utmost disrespect for the judicial process. Brown first invoked the power and authority of the federal courts in 1977, following his murder conviction,

when he filed a petition for writ of habeas corpus on the grounds that his direct state appeal was improperly dismissed. This Court affirmed the judgment of the U.S. District Court for the Eastern District of Kentucky that if Brown's state appeal were not reinstated, his conviction would be set aside. Brown's appeal was therefore heard by the Kentucky Supreme Court, which affirmed his conviction and remanded the case to the state trial court for resentencing. When Petitioner realized that the wheels of justice were not longer turning in his favor, he left for Australia where he eluded capture for a decade. Brown thus obtained a second chance to challenge his conviction and sentence by means of filings in both the state and federal courts. In so doing, he impermissibly delayed the appellate process for 10

years. [**30]

In *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), the Supreme Court held that where a defendant's flight and recapture occur before appeal, the defendant's former fugitive status does not *necessarily* have the required connection to the appellate process to justify an appellate sanction of dismissal. Precisely, the Court stated that it would not allow

> an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the appellate proceedings. Such a rule would sweep far too broadly, permitting, for instance, this Court to dismiss a petition solely because the petitioner absconded for a day during district court proceedings, or even because the petitioner once violated a condition of parole or probation.

Id. at 426.

In the instant matter, however, Peti-

tioner's conduct was far more egregious than [*583] the minor infraction contemplated by the Court as not warranting dismissal. Indeed, it boggles the mind to think that Brown would be allowed to flee the judicial process for [**31] *ten years* and then return home upon extradition to challenge that process' alleged shortcomings as though he had availed himself fully of his avenues of legal recourse from the start. In June 1993, following his ten-year absence as a fugitive, Petitioner filed a motion in state court to vacate the seventeen-year old judgment against him. The state trial court's decision to deny that motion was affirmed by the Supreme Court of Kentucky. In July 1994, Petitioner filed a second, though not successive, petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Again, he availed himself of the

mechanisms of the federal judiciary. That petition was dismissed without prejudice pending the exhaustion of all state court proceedings with respect to Brown's appeal from the denial of this motion to vacate his sentence. When the Supreme Court of Kentucky denied his petition for rehearing, thereby exhausting his state remedies, Petitioner yet a third time turned to the federal courts to petition for writ of habeas corpus, which petition was denied, leading to this appeal.

Petitioner Brown's behavior in the instant matter must be deterred. As in the *Lanier* [**32] case, he does not deserve a further decision on the merits. Following his conviction for murder, Brown invoked the mechanisms of the federal judiciary in order to guarantee the procedural integrity of his state court proceedings. His pleas by no means fell upon deaf ears.

Fair cooperation can be maintained only as long as citizens respect their duty to conduct themselves according to the widely-accepted norm of equity and reciprocity. The individual may only demand reciprocity from the State - in this case the judiciary - when he himself has respected his basic duty as a citizen not to become a fugitive from justice.

MOORE, Circuit Judge, concurring. I write separately to discuss whether this court should apply *sua sponte* the fugitive disentitlement doctrine.

Brown became a fugitive after a state court ordered that he be resentenced but before resentencing occurred. Upon his recapture, Brown initiated state post-conviction proceedings based in part on new information undermining the scientific testimony that was significant evidence at his trial. The Mason Circuit Court and the

Kentucky Court of Appeals considered and rejected the merits of the claims [**33] he now presses in federal court. The Supreme Court of Kentucky accepted discretionary review and affirmed on the merits. *See Brown v. Commonwealth*, 932 S.W.2d 359 (Ky. 1996). Although Brown's escape occurred during the pendency of state proceedings, the Kentucky courts, for whatever reason, did not invoke the fugitive disentitlement doctrine. *Cf. Harris v. Commonwealth*, 224 S.W.2d 427 (Ky. Ct. App. 1949) (dismissing an appeal of a fugitive who was still at large). In light of the Supreme Court's recent warnings against using our inherent power to control our docket as a tool for inflicting ad hoc punishment for the crime of escape, I do not believe it is appropriate for us, on the basis of his former status as a fugitive, to deny Brown

his appeal of the district court's denial of habeas relief.

In the Supreme Court's early cases approving the fugitive disentitlement doctrine, appellants had effectively abandoned their appeals by fleeing the jurisdiction of the court. *See Molinaro v. New Jersey,* 396 U.S. 365 (1970); *Allen v. Georgia,* 166 U.S. 138 (1897); [**34] *Smith v. United States,* 94 U.S. 97 (1876). Dismissal pursuant to the court's inherent powers was warranted by the fugitive's abandonment of the case and unwillingness to submit to the authority of the court. *See Allen,* 166 U.S. at 141; *Smith,* 94 U.S. at 98. Later, the Court considered a state statute that [*584] provided for automatic dismissal of a fugitive's appeal. *See Estelle v. Dorrough,* 420 U.S. 534, 535 (1975). The Court held that the Constitution did not prohibit invoking

this statute even after the fugitive was recaptured. *See id.* at 537-42. It is important to note, however, that permitting a state to follow such a strict rule of fugitive disentitlement is not the same as adopting the practice as a matter of policy for the federal courts. It is also important that the dismissal in *Dorrough* was based not on the inherent powers of the court but on a statute enacted by the legislature. *Cf. Degen v. United States,* 517 U.S. 820, 823-24 (1996) (stating that "[p]rinciples of deference [**35] counsel restraint in resorting to inherent power"); *id.* at 828 (distinguishing the Court's holding that inherent powers did not support disentitlement in the circumstances of that case from the possibility that "enforcement of a disentitlement rule under proper authority" might be per-

missible).

The courts of appeals have on occasion applied the disentitlement doctrine to appellants who were recaptured before the commencement of their appeals and even to plaintiffs in civil proceedings who were fugitives in related criminal cases. *See, e.g., Prevot v. Prevot,* 59 F.3d 556 (6th Cir. 1995) (dismissing suit under the International Child Abduction Remedies Act because plaintiff was a fugitive); *United States v. Persico,* 853 F.2d 134 (2d Cir. 1988) (refusing to review trial errors after defendant escaped for seven years between conviction and sentencing); *Broadway v. City of Montgomery,* 530 F.2d 657 (5th Cir. 1976) (dismissing suit under 42 U.S.C. § 1983 because plaintiff-appellant was a fugitive in related criminal proceeding). In these cases, the courts expanded on the basis for the fugi-

tive [**36] disentitlement doctrine, asserting that any fugitive from justice was "not entitled to call on the resources of an appellate court for a determination of his case." *Broadway,* 530 F.2d at 659.

24 *Brown v. O'Dea* Nos. 97-6355/6425

In two recent cases, the Supreme Court rejected such expansive applications of the disentitlement doctrine. The Court first considered the case of a criminal defendant who had escaped after being convicted but before being sentenced and was a fugitive for almost a year. *See Oretega-Rodriguez v. United States,* 507 U.S. 234, 237 (1993). Upon recapture, he was indicted and convicted for contempt of court and failure to appear. In the appeal of the original conviction, the court of appeals granted the government's motion to dismiss on the grounds that the appellant was disentitled to appeal because of his

escape during the pendency of the district court proceedings. *See id.* at 239. The Supreme Court reviewed the justifications for the fugitive disentitlement doctrine and noted that they "assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an [**37] appellate sanction a reasonable response." *Id.* at 244. The Court stated that "[t]hese justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal." *Id.* The Court noted that the district courts are "quite capable" of protecting their own jurisdiction with more finely tuned sanctions than are available to the courts of appeals, *see id.* at 247, and it

rejected the argument that an appellate court may "sanction by dismissal any conduct that exhibit[s] disrespect for any aspect of the judicial system." *Ortega-Rodriguez*, 507 U.S. at 247. The Court concluded:

> [W]hile dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system. Absent some connection [*585] between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing [**38] appellate process," *Estelle [v. Dorrough]*, 420 U.S., at 542, n. 11, 95 S.Ct., at 1178, n. 11, the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.

Id. at 249.

In *Degen v. United States*, 517 U.S. 820 (1996), a unanimous decision, the Supreme Court re-affirmed *Ortega-Rodriguez's* limitations on the inherent power to re-

fuse to consider claims brought by a fugitive, this time in the context of a civil action related to the criminal prosecution. Degen was living in Switzerland and did not return to the United States to face criminal prosecution for drug-related crimes. He did, however, seek to defend his property against a related forfeiture proceeding initiated by the government. The lower courts held that he was not entitled to appear in the civil forfeiture proceeding until he submitted to the criminal prosecution. *See Degen*, 517 U.S. at 822. Reversing, the Supreme Court emphasized the need for "restraint in resorting to inherent power" because of the "danger of overreaching when one branch of the Government, without [**39] benefit of cooperation or correction from the others, undertakes to define its own authority." *Id.* at 828. Despite the pos-

sible prejudice to the government's criminal case if the forfeiture proceeding were to go forward while Degen remained a fugitive, the Court believed that disentitlement was "too blunt an instrument" and would be "an arbitrary response" to the government's concerns. *Id.* at 828. Therefore, the Court held that Degen should be permitted to defend his property from forfeiture, noting that the district court could take steps to protect the integrity of the criminal case while not affording Degen any "advantage" due to his "unwillingness to appear in person." *Id.* at 827. The lesson of *Ortega-Rodriguez* and *Degen* is that we should refrain from using our inherent powers to deter conduct already deterred by the statutes criminalizing flight or to augment the punishments for that crime set by state and federal legislatures. Inherent powers

exist only to the extent that they are necessary "to protect [our] proceedings and judgments in the course of discharging [our] traditional responsibilities." *Degen*, 517 U.S. at 823. [**40]

In a case decided between *Ortega-Rodriguez* and *Degen*, this court dismissed a civil case because the plaintiff was wanted in Texas for violating the terms of his probation. *See Prevot*, 59 F.3d at 558. The plaintiff sued pursuant to an international treaty, seeking to have his children, who were living with their mother in the United States, join him in France. Acknowledging the requirements of *Ortega-Rodriguez*, we concluded that there was sufficient connection between the civil appeal and the plaintiff's flight because the civil case was his attempt to have his children join him in flight. *See id.* at 566-67. If he had not been a fugi-

tive, he would have had no cause of action at all because his probation required him to remain in the United States. In addition, the palintiff's refusal to come to this country hindered discovery in the civil case. *See id.* at 560. We therefore concluded that he was not entitled to use the courts as an aid to his flight. There is room for disagreement about whether this was a correct application of *Ortega-Rodriguez*. *See Daccarett-Ghia v. Commissioner,* 70 F.3d 621, 628 (D.C. Cir. 1995) [**41] (declining to follow *Prevot*). There is also language in the opinion that relies on arguments later rejected by the Supreme Court in *Degen,* so it is not clear whether *Prevot* would be decided the same way today. *Compare Prevot,* 59 F.3d at 567 (arguing that dismissing the custody case was the only means available to punish

Prevot for his other crimes and for "flout[ing] the interests of the criminal courts") *with Degen*, 517 U.S. at 829 ("There would be a measure of rough justice in saying Degen must take the bitter with the sweet, and participate in the District Court either for all purposes or none. But the justice wouild be too rough."); *see also Ortega-Rodriguez*, 507 U.S. at 246, 249 (rejecting "reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system" and stating that "punishment by appellate dismissal introduces an element of arbitrariness and irrationality into sentencing for escape"). There was in *Prevot*, however, at least some direct connection between the fugitive's flight and the proceedings in this court.

Like [**42] the forfeiture proceeding in *Degen*, habeas is a civil action that is closely related to a criminal case. Under the approach of *Ortega-Rodriguez* and *Degen*, disentitlement is inappropriate unless Brown's flight had a connection to the appellate process in this court. In *Ortega-Rodriguez*, the Court indicated that a lengthy escape might justify dismissal of a fugitive's appeal, even after recapture, because of the prejudice to the government if a retrial were required. *See Ortega-Rodriguez*, 507 U.S. at 249. I would hesitate, however, to invoke the disentitlement doctrine *sua sponte* purely on the basis of possible prejudice to the government. The government has never argued that Brown's prior escape deprives him of his statutory right to petition for habeas relief, and the Kentuycky courts whose proceedings Brown had directly dis-

rupted allowed him to present the merits of his claims. I do not believe it is the province of the federal courts to punish a habeas petitioner for crimes committed under the jurisdiction of the state courts.

Federal habeas courts have generally treated state-court invocations of the fugitive disentitlement [**43] doctgrine as we would treat any other state-law grounds for affirming a criminal conviction. In *Irvin v. Dowd*, 359 U.S. 394 (1959), the habeas petitioner had escaped for three weeks during the state proceedings. Under the state's disentitlement doctrine, this escape was sufficient to dismiss his direct appeal. The federal district court refused to entertain the habeas petition because it believed the state courts had affirmed the conviction on that basis. The Supreme

Court, however, pointed out that the state court's opinion had discussed both the disentitlement issue and the merits of the appeal, and that the discussion of the merits constituted an alternative basis for affirming the conviction. *See id.* at 403. Because the petitioner had obtained a decision on the merits from the highest state court, habeads review was available. *See id.* at 406.

Other courts of appeals have followed *Irvin's* approach to fugitive disentitlement in the habeas context, treating escapes during the state proceedings like any other state-law issue. Thus, when a state court dismisses a fugitive's appeal pursuant [**44] to the state's disentitlement doctrine, the recaptured fugitive's claims are cognizable on habeas only if the petitioner satisfies the usual tests for

"cause and prejudice" or "actual innocence." *See Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994). Similarly, the fugitive disentitlement doctrine can provide adequate and independent grounds fcor the state court's affirmance of a conviction only where the doctrine is applied rationally and consistently with state law. *See Doctor v. Walters*, 96 F.3d 675, 683-86 (3d Cir. 1996); *Branch v. Turner*, 37 F.3d 371, 375-76 (8th Cir. 1994), *rev'd on other grounds, Goeke v. Branch*, 514 U.S. 115 (1995).

While the escapes in some of these cases lasted only a few days, the petitioner in *Doctor* was a fugitive for more than five years -- not as long as Brown but still a significant delay in the state proceedings. Yet, the federal habeas court saw no reason to invoke the fugitive disentitlement doctrine on its own once it

had concluded that the state court's decision did not present [*587] a procedural bar to habeas review. I [**45] believe it is appropriate that we act with the same restraint in this case. Like federal district courts, state courts are quite capable of defending their jurisdiction and protecting the government from prejudicial delays. The Kentucky courts saw fit to consider the merits of Brown's challenge to his conviction despite Brown's escape pending resentencing in state court. I therefore see no reason for us to invoke this procedural bar *sua sponte,* and I concur in the majority opinion resolving the merits of this appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 97 - 30 **FILED**
SEP 30 1997

JAMES H. BROWN, III **PETITIONER**

VS. **JUDGMENT**

MICHAEL J. O'DEA, III,
Warden, Eastern Kentucky
Correctional Complex **RESPONDENT**

This matter is before the court upon the Report and Recommendation of the United States Magistrate Judge, and having considered de novo those objections filed thereto by petitioner, and the court being sufficiently advised,

IT IS ORDERED AND ADJUDGED that the objections to the Report and Recommendation of the Magistrate Judge be, and they are, hereby **overruled**; that the Report and Recommendation of the Matgistrate Judge be, and it is, hereby **adopted** as the findings of fact and con-

clusions of law of the court; that the motion of respondent for summary judgment (Doc. #8-2) be, and it is, hereby **granted**; that the motion of respondent to dismiss (Doc. #8-1) be, and it is, hereby **denied as moot**; that the petition for writ of habeas corpus be, and it is, hereby **denied**; and that this matter be, and it is, hereby **dismissed**, with prejudice, and **stricken** from the docket of this court.

This 30th day of September, 1997.

"s William O. Bertelsman, Chief Judge"

FILE COPY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
September 30, 1997

Case Number: 2:97-cv-00030

Kevin McNally

Gail Robinson

A. B. Chandler III

Todd D. Ferguson

Certificate of Mailing by "s-LBB."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON
CIVIL ACTION NO. 97 - 30

FILED
August 22, 1997

JAMES H. BROWN, III **PETITIONER**

VS.

MICHAEL J. O'DEA, III, Warden, **RESPONDENT.**

REPORT AND RECOMMENDATION

On February 12, 1996, petitioner James Brown, by counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner is currently incarcerated at the Eastern Kentuckuy Correctional Complex. On October 29, 1996, respondent, by counsel, filed an "Answer and Response to Petition for Writ of Habeas Corpus; Motion to Dismiss, and Alternatively, Motion for Summary Judgment." This matter has been referred to the undersigned for initial consideration and for a report and re-

commendation pursuant to 28 U.S.C. §636(b).

I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case have been described in several prior state court opinions, including most recently by the Supreme Court of Kentucky in Brown v. Commonwealth of Kentucky, 932 S.W.2d 359 (Ky. 1996), which involved an appeal of the denial of petitioner's Ky CR 60.02 motion:

> Appellant and his brother, Mark Brown, in separate trials, were convicted in 1976 of the murder of Bryant Dudley and each conviction was appealed. This Court affirmed the conviction of Mark Brown in Brown v. Commonwealth, Ky., 555 S.W.2d 252 (1977). Although this Court found no reversible errors in the trial of appellant, the Court remanded to the trial court to comply with the presentening requirements set forth in KRS 532.050. Brown v. Commonwealth, Ky., 639 S.W.2d 758 (1982), cert. denied, 460 U.S. 1037, 103 S.CT. 1428, 75 L.Ed.2d 788 (*2) (1983).

Appellant, who was apparently free on bond during the pendency of his appeal, fled to Australia, where he lived for several years. Although the record is not clear on this matter, appellant apparently was extradited and was sentenced in 1993 to twenty years imprisonment. In 1993, appellant filed a motion pursuant to CR 60.02(f) to set aside his conviction because the Commonwealth's expert witness in Appellant's trial indicated to defense counsel that portions of his testimony could have been erroneous. The trial court denied that motion. Thus the appeal.

This Court set forth a detailed description of the evidence in this case in Brown, 639 S.W.2d at 759-60. Therefore, a summary will suffice for our purposes.

Mark Brown believed that the victim, Dudley Bryant, had broken into Mark's home and stolen drugs from him. Mark Brown and appellant took the victim for a ride in appellant's car on the evening of May 17, 1976, during which time Mark Brown questioned the victim about the drug theft while brandishing a handgun. The following night, May 18, 1976, Mark Brown and appellant stopped by the victim's girlfriend's house, where they found the victim. The victim left with the Brown brothers in appellant's car and went to Mark Brown's home. Four visitors to Mark

Brown's home saw Mark Brown, appellant and the victim there together. The visitors were told that Mark Brown and appellant were planning to go to Lexington later that night.

The Brown brothers traveled to Lexington later that night, where they spent the night with friends. The next day, Mark went to appellant's car and fired a shotgun, allegedly to test the shotgun's safety mechanism. Later that day, May 19, 1976, appellant traded his boots to one of his Lexington friends. Those boots were stained with type A blood, the blood type of appellant and the victim.

A few days later, Mark Brown called a friend, Robert Collins, in Mason County, and asked Collins to help him locate and bury the victim's body. Mark Brown took Collins to Morton's Lane in Mason County and told Collins that the Morton's Lane area is where "they" had shot the victim. Mark Brown and Collins did not find the body.

Afterwards, the police did find the body off Morton's Lane. Death was caused by two wounds in the back from a side-by-side shotgun. A police witness at Appellant's trial testified that the wound was inflicted by a No. 6 shot fired from a .12 gauge shotgun. The witness identified the shotgun-

shell wadding as having come from Federal brand shotgunh shells. (*3)

The evidence also showed that appellant owned a side-by-side, double-barreled Stevens .12 guage shotgun, which had a defective safety mechanism. Authorities recovered Federal .12 gauge, No. 6 shot shotgun shells from appellant's mother's house, where he resided. Tire marks similar to the tires on appellant's car were found near the victim's body.

In addition to the above-described evidence, the Commonwealth produced expert testimony at [petitioner's trial. Dr. Robert Shaler studied blood samples and concluded that based on the presence or absence of specific genetic markers in the samples, that the blood found on appellant's boots was found in onmly 4.6% of the population and could not have been the blood of appellant. Dr. Shaler did not testify that the blood on the boots belonged to the victim and he did not rule out the possibility that the blood stain could have been the blood of a third person. Furthermore, the defense presented no evidence at trial that the blood stain on the boots was appellant's.

Defense counsel interviewed Dr. Shaler in 1993. At that time, according to the affidavit of defense counsel, Dr. Shaler indi-

cated that he was mistaken in asserting that the blood stain on the appellant's boots could not have belonged to appellant. The affidavit formed the basis for appellant's motion purusant to Rule 60.02(f) to vacate his conviction. The trial court declined to hold an evidentiary hearing but assumed defense counsel's affidavit to be a true reflection of Dr. Shaler's thinking about his earlier testimony. The trial court denied appellant's motion because "the exclusion of the testimony of ... Shaler would in all probability not have affected the verdict of the jury." The court noted that "[i]n view of the overwhelming evidence, Shaler's testimony was not crucial to the Commonwealth's case."

The Court of Appeals affirmed, citing among other things, the prior appeal of appellant to this [Kentucky Supreme] Court. In 1982, this Court ruled that Dr. Shaler's testimony was admissible in appellant's trial. The Court stated that questions raised on appeal surrounding the testiony related to the credibility and weight of the testimony rather than its admissibility. Brown, 639 S.W.2d at 760. In discussing the evidence, the Court noted the evidence summarized above, without Dr. Shaler's testimony, "was sufficient to justify the conviction of Jim Brown. ...?" Id.

Id. at 360-61. The Supreme Court of Kentucky went on to affirm the denial of Ky. CR 60.02 relief by a 4-3 vote with three special (*4) justices sitting.[1] The majority concluded:

> As the summary of the evidence shows, there was ample circumstantial evidence in the record upon which the jury could have based its verdict. Indeed, as noted above, this Court has earlier concluded that the evidence at trial, absent the testimony of Shaler, was sufficient to convict appellant Brown, supra at 760.

Id. at 362. Petitioner's petition for rehearing was denied by the state court on November 21, 1996.

Petitioner now seeks a writ of habeas corpus from this court, alleging that his conviction violates the United States Constitution. Petitioner presents six arguments as grounds for relief: 1) That

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[1]In the Commonwealth of Kentucky, special justices may be appointed by the Governor if sitting justices are disqualified. See KRS 21A.120.

his conviction deprived him of due process because the Commonwealth failed to prove guilty beyond a reasonable doubt; 2) That he was denied a fair trial due to the admission of Dr. Shaler's testimony; 3) That he was denied due process when the trial court overruled his motion for a continuance; 4) That he was denied a fair trial when the trial court overruled his petition for a change of venue; 5) That he was deprived of his rights of confrontation and due process by the admission of hearsay at trial; and 6) That he was denied a fair trial due to prosecutorial misconduct. Petitioner's arguments will be addressed in seriatim. As will be indicated in the following analysis, a few of petitioner's arguments concern fundamental errors in his trial which, had they been properly presented by petitioner either on direct appeal or in a

timely petition for writ of habeas corpus, may well have afforded him relief. However, this court concludes that the instant petition (*5) should nevertheless be denied. Although the Great Writ exists to protect against convictions which are obtained in violation of constitutional rights, at some point in time even convictions obtained from flawed trials must be held to be final and free from belated collateral attacks, at least where there is no proof of actual innocence. The writ will be denied in this case in part because the court concludes that petitioner has too long delayed the filing of his petition, and because petitioner's failure to abide by state procedural rules has resulted in a waiver of his claims in state court. In addition, the court has discovered that this is petitioner's second federal petition for writ of habeas

corpus.

II. ANALYSIS

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. This petition was filed on February 12, 1997, but neither party has submitted any argument with respect to the application of the AEDPA. Because the Act contains a number of provisions which arguably apply to the instant petition, the court will address the effect of the AEDPA sua sponte.

Another issue which the court must address sua sponte concerns the procedural posture of this case. Unfortunately, the undersigned had virtually completed review of this petition when, in a review of documents contained in the state court record but not referenced by respondent, the court discovered that the instant pe-

tition is (*6) petitioner's second federal petition for writ of habeas corpus.[2]

Petitioner filed his first petition for writ of habeas corpus in this court after his initial appeal of his conviction in state court was dismissed as untimely. Petitioner thereafter petitioned this court for a writ of habeas corpus on the grounds that he had been unconstitutionally denied his right to appeal. In 1979, this court conditionally granted petitioner's first petition for writ of habeas corpus and ordered the state court either to reinstate his appeal or to retry him.[3] On September 4, 1979,

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[2]The respondent's failure to plead abuse of the writ and failure to brief, or even to mention, the impact of the AEDPA is disconcerting. The response to the petition was a relatively brief eleven pages. Suffice it to say, the complex issues presented in this petition was not fully addressed.

[3]Petitioner was originally sentenced by the state court to twenty years on October 15, 1976.

According to the presentencing report in the record, he was released on a state court bond pending appeal on October 30, 1976. On October 5, 1977, the Kentucky Supreme Court dismissed petitioner's direct appeal as untimely. Docket records kept in this court reveal that on October 31, 1977, petitioner filed a petition for writ of habeas corpus on grounds that his appeal should not have been dismissed. On February 6, 1978, this court denied petitioner's petition due to his failure to exhaust his state court remedies, but retained the case on this court's docket pending exhaustion of those remedies.

On March 17, 1978, petitioner's motion for a belated appeal was granted by the state court, but was again dismissed on August 22, 1978. Petitioner was resentenced to twenty years by the state court on September 5, 1978. On August 24, 1978 petitioner filed a motion to reconsider his petition for writ of habeas corpus in this court. On June 27, 1979 this court granted petitioner a conditional writ of habeas corpus, but stayed the writ for a period of sixty days so that petitioner's appeal to the Kentucky Supreme Court could be reinstated. The court ordered that if petitioner's appeal were not reinstated, petitioner's conviction would be set aside. The Sixth Circuit affirmed the judgment of this court and the Supreme Court denied the petition for writ of certiorari. Brown v. Smith, 633 F.2d 213 (6th Cir. 1980) (Unpublished, Table); Smith v. Brown, 101 S.Ct. 2341 (1981) (mem.); see

this court also (*7) released petitioner on bond pending the Commonwealth's appeal of the grant of the writ. Ultimately, this court's judgment was affirmed, petitioner's appeal was reinstated, and was decided by the Supreme Court of Kentucky on August 31, 1982 in the opinion quoted from herein. The state court affirmed petitioner's conviction, but vacated for resentencing due to the lack of any record disclosing whether a presentencing "investigation or report was requested or considered" prior to sentencing.[4] Petitioner's petition for writ of certiorari was denied by the United

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also Cleaver v. Bordenkircher, 634 F.2d 1010, 1011 (6th Cir. 1980), cert. denied, 451 U.S. 1008 (1981).

[4]Curiously, a presentence investigation report originally dated October 5, 1976 (following petitioner's conviction on September 30, 1976) and updated on August 30, 1978 appears in the record.

States Supreme Court on March 21, 1983.

Petitioner had remained free on this court's bond during the pendency of his federal and state court appeals. Following remand for new sentencing by the Kentucky Supreme Court, petitioner's resentencing date was rescheduled for February 4, 1983. Petitioner failed to appear for his resentencing in state court, and thereafter remained a fugitive until May 23, 1993.[5] Although the record is not entirely clear as to petitioner's whereabouts during this more than ten-year period, it is apparent that he spent most of the time evading the state court judgment by fleeing to Australia.[6]

It was not until June 21, 1993, after

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[5]A warrant for petitioner's arrest was filed on January 28, 1993 and was executed on May 23, 1993.

[6]In Australia, the record indicates that petitioner assumed a new identity as a businessman named Geoffrey Lyons.

petitioner had been (*8) extradited from Australia back to this country to face resentencing on his murder conviction, that petitioner filed a motion pursuant to Ky CR 60.02 to vacate his conviction based upon the allegedly unconstitutional admission of Dr. Shaler's testimony against him at his 1976 trial. On July 21, 1993, petitioner was resentenced to the same twenty year term originally imposed on October 15, 1976. Petitioner's appeal of the denial of his CR 60.02 motion was decided by the Supreme Court of Kentucky on August 29, 1996 and he filed the instant petition in this court on February 12, 1997.

A. Successive Petition?

As indicated, the instant proceeding is petitioner's second petition for writ of habeas corpus filed in this court. Prior to the enactment of the AEDPA, Rule 9(b)

of the Rules Governing Section 2254 Cases attempted to limit successive petitions by stating:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

It is unclear whether the instant petition would be deemed to be "successive" under Rule 9(b), in part because the original petition is not included in the present record. If the instant petition raises entirely new grounds, the issue under pre-AEDPA law is whether those grounds could have been raised in the first petition. See McCleskey v. Zant, 499 U.S. 467, 493 (1991).[7]

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[7]Ordinarily, before a petition may be dismissed for abuse of the writ, the government must plead

(*9) In addition to whatever effect Rule 9(b) might still have on the present petition, the petition is clearly affected by the AEDPA. The AEDPA amends 28 U.S.C. §2244 to forbid any "second or successive" petition for collateral relief without the consent of the court of appeals, which may be granted only in limited circumstances. 28 U.S.C. §2244(b)(3). Specifically, the Court of Appeals may authorize this second petition only if the claims presented

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abuse of the writ. McCleskey v. Zant, 499 U.S. 467, 477, 111 S.Ct. 1454, 1470 (1991). Once abuse of the writ has been pled, petitioner must show that he has not abused the writ in seeking habeas relief. Id.; Sanders v. United States, 373 U.S. 1, 10-11, 83 S.Ct. 1068, 1074-75 (1963).

The Sixth Circuit has not addressed the issue in a published opinion, but a few federal courts outside of this circuit have held that a court may raise abuse of the writ sua sponte so long as the petitioner has notice and the opportunity to respond. See Femia v. United States, 47 F.3d 519, 524-25 (2d Cir. 1995); Briggs v. United States, 48 F.3d 288 (8th Cir. 1995); United States v. Fallon, 992 F.2d 212, 213 (8th Cir. 1993).

satisfy §2244(b)(1) and (2):

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for (*10) constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2244(b). Even if the court of

appeals authorizes the filing of the second petition, a district court is later required to dismiss the petition "unless the applicant shows that the claim satisfies the requirements of this section." §2244(b)(4). If a litigant files a second petition in district court without first seeking leave from the court of appeals, at least some courts would dismiss it for want of jurisdiction. See Nunez v. United States, 96 F.3d 990 (7th Cir. 1996).

In this case, petitioner filed his petition in this court without seeking the requisite certification from the Sixth Circuit Court of Appeals. Unfortunately, the undersigned discovered the existence of the prior petition only by chance, after substantially completing review of the present petition.

The Sixth Circuit has instructed dis-

trict courts to transfer pending petitions for writs of habeas corpus to that court for certification where a prisoner has failed to first seek permission to file the successive petition from the court of appeals as required under §2244(b)(3). In re Sims, 111 F.3d 45, 47 (6th Cir. 1997). Obviously, the purpose of §2244(b)(3) has been frustrated in this instance, where the court only discovered the existence of the 1977 petition after completing review of the instant petition. If the Sixth Circuit grants certification, then this court will necessarily have to perform the same analysis it has already undertaken.

Thus, it appears that this court should transfer this (*11) proceeding to the Sixth Circuit, pursuant to 28 U.S.C. §1631, for a ruling on certification.[8]

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[8]The application of the AEDPA's rules governing successive petitions to petitioner's whose first

Assuming that transfer is required and that this court lacks jurisdiction under the AEDPA, the remainder of this opinion is necessarily dictum. However, the court will include its analysis of the merits of the petition in the interest of judicial economy.

B. Petitioner's Claims are Time-Barred

Prior to the AEDPA's enactment, state prisoners had significantly more discretion in deciding when to file a federal habeas petition. See Calderon v. United States District Court for the Central District of California, 112 F.3d 386 (9th Cir. 1997). A limit on that discretion existed in Rule 9(a) of the

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petitions were filed prior to the enactment of the AEDPA does not ordinarily pose retroactivity concerns. See e.g. Wilson v. United States, ___ F.Supp. ___, 1997 WL 402445 (E.D. Mich. 1997); Nunez, 96 F.3d at 992; Liriano v. United States, 95 F.3d 119, 120 (2d Cir. 1996); but see Burris v. Parke, 95 F.3d 465 (7th Cir. 1996) (en banc).

Rules Governing Section 2254 Cases in the United States District Courts. Although the AEDPA imposes new and stricter limits, Rule 9(a) arguably continues to permit dismissal:

> if it appears that the state ... has been prejudiced in its ability to respond to the petition by delay in filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Although Rule 9(a) does not permit dismissal absent prejudice to the state, see Lonchar v. Thomas, 116 S.Ct. 1293 (1996), a delay of more than five years may create a presumption of prejudice. See Rule 9(a), advisory committee notes, cited in Harrison v. Parke, 110 F.3d (*12) 64 (6th Cir. 1997) (Table, text available on Westlaw); see also Young v. Parke, 989 F.2d 501 (6th Cir. 1993) (Table, text

available on Westlaw); Buchanon v. Mintzes, 734 F.2d 274, 277 (6th Cir. 1984), cert. dismissed, 471 U.S. 154 (1985). But see Lonchar, 116 S.Ct. at 1300 (noting that the framers of the Rule rejected a provision which presumed prejudice after a delay of five years). Under a two-pronged test established in Davis v. Adult Parole Authority, 610 F.2d 410, 414 (6th Cir. 1979), the state must appear to have been prejudiced in its ability to respond to petitioner's claims and petitioner must be allowed to meet or rebut the apparent prejudice. In this case, I conclude that under Rule 9(a) petitioner's delay of over fourteen years in filing this petition creates a presumption of prejudice. Although this issue is raised sua sponte by the court, petitioner has the opportunity to rebut the presumption of prejudice in his objec-

tions to this Report and Recommendation.

In addition to Rule 9(a), the AEDPA imposes a new one-year statute of limitations. It is unclear whether the AEDPA wholly replaces Rule 9(a) or whether it merely refines that rule. In any event, 28 U.S.C. §2244 now provides:

> (d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall run from the latest of --
>
> > (A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing any such State action; (*13)
> >
> > (C) the date on which the constitutional right asserted was initially recognized by

> the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Under the AEDPA, petitioner would have had one year to file his federal petition from the date his process of direct review came to an end, which date at the latest would be March 21, 1983 - the date the United States Supreme Court denied review of the Supreme Court of Kentucky's 1982 opinion affirming his conviction.[9] Applying

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[9]Some courts have concluded that the statute of limitations runs from the date on which a defendant

the AEDPA's limitation period in this fashion obviously bars many prisoners from filing petitions that would have been timely prior to the enactment of the AEPDA. Whether this result was intended by Congress or should be enforced by the courts is the subject of much debate, but little consensus at this time.[10]

Some courts have decided that the statute of limitations should apply as written to all cases filed after the date of enactment of (*14) the AEDPA. Under this interpretation, petitioner's claims are clearly time-barred. See e.g. United

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is sentenced, as opposed to the date of conviction, but the facts of those cases are easily distinguishable from the present case, where petitioner failed to appear for resentencing for more than ten years. Compare Burris v. Parke, 95 F.3d 465 (7th Cir. 1996) (en banc).

[10]It is important to note that this issue was left open in Lindh v. Murphy, 117 S.Ct. 2059 (1997).

States v. Smith, 966 F.Supp. 408 (E.D. Va. 1997); Clarke v. United States, 955 F.Supp. 593 (E.D. Va. 1997); Chapdelaine v. United States, 1997 WL 446465 (D.R.I. 1997) (unpublished); Harold v. United States, 932 F.Supp. 705 (D. Md. 1996); Curtis v. Class, 939 F. Supp. 703 (D.S.D. 1996); United States v. Bazemore, 929 F.Supp. 1567 (S.D. Ga. 1996). Other courts have determined that such a harsh result was not intended by Congress, and/or is not permitted by the Constitution, and that a one-year "grace period" should apply. See e.g. Calderon, 112 F.3d at 389 (holding that any petition filed prior to April 24, 1997 will be deemed to be timely filed); accord, Flowers v. Hanks, 941 F.Supp. 765, 770-71 & n. 5 (N.D. Ind. 1996); Duarte v. Hershberger, 947 F.Supp. 146, 148-49 (D.N.J. 1996); Martin v. Jones, ___ F.Supp. ___, 1997 WL 416485

(M.D. Tenn. 1997). Still other courts have held that the Act requires petitions to be filed within a "reasonable times" which may be shorter than one-year from the date of enactment of the AEDPA. See Peterson v. Demskie, 107 F.3d 92 (2nd Cir. 1997) (holding that petition filed more than one year after state court direct review was completed but within 72 days after effective date of AEDPA was filed within "reasonable time").

None of the three approaches is without analytical difficulties. Having carefully reviewed all three approaches, however, I conclude that the the AEDPA should be applied as written and that petitioner's petition was time-barred when it was filed because it was filed more than one year after his process of direct review in state court came to an end. (*15)

Alternatively, I would hold that the

petition is time-barred under the "reasonable" statute of limitations approach used by the Demskie court. In this case, petitioner had fourteen years in which to contemplate bringing his federal habeas petition; under these circumstances, the delay of ten months after the enactment of the AEDPA in which petitioner took to file his petition is patently unreasonable. See Demskie, at 93. Rather than seeking post-conviction relief from this court more than fourteen years ago, petitioner chose to flee to Australia for more than ten years, not returning to Kentucky for sentencing until 1993.

Although the AEDPA contains a provision for tolling the period of time in which a petitioner is seeking post-conviuction review in state court (in this case from June 21, 1993 until August 29, 1996), that provision does not apply in this case,

where the statute of limitations ran long before petitioner sought collateral review in state court. Even employing the Demskie approach, I do not believe that the tolling provision would apply to this case. The tolling provision applies only to exclude the time in which a "properly filed" state court post-conviction application is pending. Petitioner's delayed CR 60.02 motion should not constitute a "properly filed" application, where that motion presented only petitioner's claim that he has discovered new evidence which undermines Dr. Shaler's testimony, and presented no other claims included in his current federal petition.[11]

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[11]Even if the tolling provision applied, petitioner delayed nearly six months after the completion of his state post-conviction proceedings before filing this petition. Under the peculiar circumstances of this case, petitioner's delay was unreasonable. See e.g. Kirby v. Senkowski, 1997 WL 399663 (S.D.N.Y. 1997) (unpublished) (holding that

Moreover, the record (*16) suggests that petitioner could have discovered the factual basis for his CR 60.02 claim long before that motion was filed.[12]

In short, even giving petitioner the benefit of the doubt, it is clear that he could have sought post-conviction relief in state court many years ago had he not

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356 days after the effective date of the AEDPA was unreasonable where petitioner took almost nine years total to file his federal petition); accord Maddaloni v. Greiner, 1997 WL 438801 (S.D.N.Y. 1997) (unpublished).

[12]The claim is supported in part by Dr. Shaler's testimony in a 1988 New Jersey case, but there is no indication in the record as to when the scientific basis for the claim was known to petitioner. Petitioner's original appellate brief, filed July 31, 1981, contains an argument that "[a]ccording to the published [scientific] research, the accuracy of Dr. Shaler's conclusions is extremely doubtful." It is obvious that petitioner was well aware of the basis for his claim by the time he was extradited to this country; petitioner was arrested on May 23 and filled his CR 60.02 motion less than one month later.

fled to Australia. Not only could petitioner have presented virtually all of his claims in a post-conviction proceeding in state court as early as 1983, but he could have presented the same claims to this court long ago. Petitioner's delay in filing his petition in this case violates the statute of limitations in the AEDPA as well as Rule 9(a).

The Merits

C. Sufficiency of the Evidence

With respect to the merits of the petition, petitioner argues first that the evidence against him was constitutionally deficient. He concedes that circumstantial evidence existed which linked Mark Brown with the murder of the victim, but argues that the only evidence linking him (rather than his brother) with the murder was too unreliable and/or inconclusive to support a conviction. (*17)

The evidence against petitioner was most recently summarized by the Supreme Court of Kentucky in its 1996 opinion, as quoted above. In addition, the Supreme Court summarized most[13] of the evidence in greater detail in its 1982 opinion as follows:

> With two major differences the evidence in Jim's trial was much the same as it was in Mark's. Mark was done in by the testimony of Robert Collins, who said that Mark had confided in him and admitted that he and Jim had killed Dudley. This evidence, of course, was not admissible against Jim. In Jim's trial, on the other hand, there was expert evidence that blood found on Jim's boots was not his blood but could have been Dudley's. That evidence was not introduced in

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[13]The state court previously held that the evidence it summarized was sufficient for conviction. The court specifically excluded from its summary the expert testimony of Dr. Shaler and testimony by Jerry Conley, a cellmate of the brothers, that Mark Brown had offered to pay him one thousand dollars to kill Robert Collins so he could not testify at trial and that petitioner had agreed "with his head" to the proposal.

Mark's trial.

To summarize the events, it will be recalled that Mark strongly suspected that Dudley had stolen a quantity of marijuana from his apartment in Maysville, and was threatening to shoot him. On the night of Monday, May 17, 1976, Jim, Mark and Robert Collins went riding in Jim's automobile and picked Dudley up. As they continued riding around with Jim driving, Mark displayed a .45-caliber pistol and, pointing it in the "general direction" of Dudley, questioned him with regard to the theft of drugs from Mark's apartment. Collins became apprehensive and asked that he be taken back to his car, which was done. When Collins parted company with them, Mark, Jim and Dudley were still together. On the next night, Tuesday, May 18, 1976, Jim and Mark were in Jim's car on 4th Street in Maysville and indicated to Chan Warner and Earl Black that they were looking for Dudley. Shortly thereafter they found him at the home of his girl friend, Anna Corde, and he left with them in Jim's car. Later on, between 11:30 and midnight, four boys came to Mark's apartment but stayed only a few minutes because the Browns were planning to go to Lexington. Dudley was in the kitchen with Mark "snorting something," and appeared to be "high." Jim, on the other hand, was sitting on a chair in the living

room and appeared to be normal. So far as we know from the evidence, this was the last time anyone other than Jim and Mark Brown saw Dudley alive.

(*18) At 3:00 or 3:30 in the morning (Wednesday, May 1976) Jim and Mark arrived at the apartment of several friends in Lexington, Kentucky, about 65 miles from Maysville, and went to bed on a couch. Wednesday was Jim's usual off-day from work, and he had made similar visits on several previous occasions, usually arriving, however, on Tuesday evening. Mark had not accompanied him before. Later on during this particular day, after the Brown boys had arisen they played cards and listened to records with some of their hosts, after which Mark cleaned out Jim's car and disposed of some trash. During this activity Mark fired a shotgun which he or Jim, or both, had in the automobile, explaining afterward that he had been testing a defective safety mechanism. Sometime in the middle of the day, around noon or 1:00 P.M., Jim, Mark and a young man named Hutchison went over to Hutchison's nearby apartment and Jim asked Hutchison if he wanted to buy a pair of boots. Hutchison said no, but that he had an old pair he would trade for them. Jim thereupon traded his boots for the old boots, and also traded the shirt he was wearing for

one of Hutchison's shirts. According to Hutchison, Jim gave no explanation for wanting to make these exchanges. Later, however, after Hutchison began to hear rumors (after discovery of the murder, presumably) he took a good look at the boots, which he had not worn, and discovered a stain or stains on them. Eventually, after being questioned by investigative officers, Hutchison turned the boots over to a detective. A laboratory examination disclosed the presence of Type A human bloodstains on the boots. Both Jim Brown and Dudley had Type A blood.

In the early morning hours before daylight on Saturday, May 23, 1976, Mark and Robert Collins borrowed an automobile and went out to the scene of the crime for the purpose of burying Dudley's body, but were unable to locate it. According to Collins, Mark "could not remember where it was, where they killed him." Jim Brown did not take part in this expedition.

On May 27 Dudley's badly-decomposed body was found by the side of a country lane near Maysville. His death had resulted from two side-by-side shotgun wounds in the back. It was established that these wounds had been inflicted by No. 6-size shot fired from a .12-gauge shotgun. Pieces of wadding recovered from

> the body were identified as having come from Federal brand shotgun shells. Jim Brown owned a double-barreled .12 gauge Stevens shotgun that was capable of firing both barrels simultaneously. It had a defective safety device. There were some Federal .12 gauge shells in his mother's home, where he resided. Blood from various objects recovered at the death scene was of Type A. Tire marks indicating (*19) where an automobile had recently stopped were similar to the treads on the tires of Jim Brown's automobile.
>
> It is our opinion that the evidence thus far summarized was sufficient to justify the conviction of Jim Brown in the killing of Dudley at some time during the interval of three hours or so from the departure of the four visitors from Mark's apartment between 11:30 p.m. and midnight on Tuesday, May 18, until the arrival of Mark and Jim in Lexington at 3:00 or 3:30 in the morning of Wednesday, May 19.

Brown, 639 S.W.2d at 758-760.

To determine whether the evidence in this case was sufficient to uphold petitioner's conviction under the Due Process Clause of the Fourteenth Amend-

ment, this court need only ask if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); see also United States v. Wright, 16 F.3d 1429, 1439 (6th Cir.), cert. denied, 512 U.S. 1243 (1994). The evidence presented is to be viewed in the light most favorable to the state. See Stacy v. Love, 679 F.2d 1209, 1213 (6th Cir.), cert. denied, 459 U.S. 1009 (1982). Any conflicting inferences arising from the record must be resolved in favor of the prosecution. Walker v. Engle, 703 F.2d 959, 969 (6th Cir.), cert. denied, 464 U.S. 962 (1983).

Petitioner argues that various pieces of evidence against him should have been interpreted differently by the jury, because they are not inconsistent with his alleged innocence. However, circumstantial

evidence may support a conviction, see Tilley v. McMackin, 989 F.2d 222, 225 (6th Cir. 1993), and such evidence need not remove every reasonable hypothesis except that of guilt. United States v. Peters, 15 F.3d 540, 544 (6th Cir.) (citations omitted), cert. denied, 513 U.S. 883 (1994). Taking into account the (*20) responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to the ultimate facts, see Neal v. Morris, 972 F.2d 675, 677-78 (6th Cir. 1992), I am persuaded that the evidence in this case was constitutionally sufficient.[14]

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[14]Because petitioner has failed to show that he is entitled to federal habeas corpus relief under the more expansive, preamendment scope of review, it follows that he would also fail to meet the greater burden imposed by the heightened deference required by the AEDPA. See 28 U.S.C. §2254(d); Ford v. Ahitow, 104 F.3d 926, 936 (7th Cir. 1997); Drake

Petitioner also argues that the reliability of the testimony of one of the state's witnesses was "questionable," and that the testimony of defense witnesses concerning petitioner's good character and lack of violent tendencies should have been believed. However, under Jackson, it is not for the court to "weigh the evidence, assess the credibility of the witnesses, or substitute [its] judgment for that of the jury." United States v. Wright, 16 F.3d 1429, 1440 (6th Cir.), cert. denied, 512 U.S. 1243 (1994) (citing United States v. Evans, 883 F.2d 496, 501 (6th Cir. 1989)).

Petitioner further contends that this court should not credit the state court's analysis of the evidence because of what

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v. Superintendent, Trumbull Correctional Institution, 106 F.3d 400 n. 1 (6th Cir. 1997) (Table, text available on Westlaw).

he describes as significant errors by that court. Specifically, petitioner argues that in its 1996 opinion summarizing the evidence, the Supreme Court erred by stating that Jim Brown was the owner of a double-barreled Stevens .12 gauge shotgun, because petitioner's mother testified only that she thought it belonged to Jimmy. However, the state court did not err in characterizing this evidence (*21) in a light favorable to the government. See Jackson v. Virginia, 443 U.S. at 319.

Petitioner additionally argues that the state court misstated that shotgun shells were recovered from the home in which he resided when in fact there was testimony that the shells were recovered from the residence of Mark Brown. The respondent does not deny that the state court mischaracterized this particular piece of evidence; however, despite this apparent

error, I conclude that the evidence on the whole was sufficient to support the conviction. The residence where the shotgun shells were found is but one piece in a myriad of otherwise convincing circumstantial evidence, and a correct characterization would not have affected the state court's conclusions.

Finally, petitioner argues that the state court mischaracterized the tire mark evidence as "marks similar to the tires on [petitioner's] car" when in fact the expert witness testified that he did not make a determination as to whether or not the tires from petitioner's car made the marks which were found. Again, the evidence was properly summarized by the state court in a light favorable to the prosecution. A review of the expert's testimony indicates that he testified that the marks contained a distinct element

which also appeared on a petitioner's tires.

D. Admission of Dr. Shaler's Testimony

Petitioner's second ground for habeas relief rests on his argument that he was denied a fundamentally fair trial by the admission of the expert testimony of Dr. Robert Charles Shaler. This argument, had it been timely presented, may well have afforded (*22) petitioner habeas relief.

Dr. Shaler was called to testify on blood evidence as a surprise last witness by the Commonwealth.[15] At the time, the trial court refused to grant the defense a continuance in order for counsel to research Dr. Shaler's blood-grouping theories.

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[15]The prosecutor apparently learned of Dr. Shaler through a Playboy magazine article he read shortly before trial. T.E. 134. He did not contact Dr. Shaler until the Friday prior to the trial, which began on Monday.

Both petitioner and the victim had Type A blood. Dr. Shaler testified that he tested samples of petitioner's blood, the dried blood spots on the boots, and the dried blood on the victim's jeans. He performed an analysis using "GM Blood Groups." Based upon his analysis of GM antigens which were either present or absent in each blood sample, Dr. Shaler testified that the dried blood on the boots formerly owned by petitioner could not have been petitioner's blood, because petitioner's blood contained the presence of GM antigen #12, whereas the dried blood on the boots did not contain that antigen. Moreover, Dr. Shaler testified that the blood on the boots could have been the victim's blood, because the victim's blood also lacked GM antigen #12, and that approximately 4.6% of the population has the type of blood found on the boots.

Petitioner first argues that Dr. Shaler's testimony was biased because his research program was funded by a grant from a law enforcement agency. Petitioner also argues that the trial court erred by admitting the testimony based solely on Dr. Shaler's representations that the GM blood grouping test was reliable and the test results accurate, when in fact the GM blood grouping test was (*23) a new scientific procedure at that time. As did the Supreme Court of Kentucky, I conclude that both of these arguments go to the credibility of Dr. Shaler's testimony rather than its admissibility. Petitioner's counsel was aware of the funding of Dr. Shaler's research program at the time of trial. Neither argument suggests that the admission of the testimony amounted to a violation of petitioner's due process rights.

Petitioner argues more persuasively that Dr. Shaler's testimony should not have been admitted under either the Frye[16] test or state law, because the GM test on dried blood was not generally accepted in the scientific community at the time of trial. In addition to citations to federal law, petitioner relies on a California case which holds that mere assertions of reliability of a scientific test by the witness who conducted the test are insufficient to establish the general acceptance of the test. Petitioner also relies heavily on a New York case, People v. Alston, 79 Misc.2d 1077, 362 N.Y.S.2d 356 (1974), in which the court held that a type of blood test to determine the gender of dried blood cells was inadmissible

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16Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), superseded by Fed.R.Evid. 702; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

because general scientific acceptance of the technique had not been demonstrated.

Of course, it is **Kentucky** law and not California or New York or federal law which governs this evidentiary issue.[17] Habeas corpus (*24) relief is not available for alleged errors in the application of state law, unless the error results in the denial of fundamental fairness so as to constitute a violation of due process. See Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988). In this case petitioner makes the requisite showing.

Post-trial evidence now suggests that Dr. Shaler's testimony may have been

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[17]The cases on which petitioner relies are also distinguishable on several grounds, including the fact that they involve review on direct appeal rather than the more narrow scope of review available in habeas corpus. In fact, petitioner cited the same case law in his 1981 direct appeal to the Supreme Court of Kentucky.

erroneous. Dr. Shaler had previously testified in a case involving similar GM testing on dried blood in State v. Leroy Howard, Gloucester County, New Jersey Indictment No. 1-0775-10-84. In that case, Dr. Shaler testified that the absence of GM 12 in a dried blood sample linked the sample to the defendant. However, in 1988 an expert from John Hopkins University concluded that Dr. Shaler's 1976 GM typing of defendant Howard was incorrect. Another expert wrote a letter to the prosecutor in the Howard case, noting that:

> 7. It is evidence from Dr. Shaler's results that the system is relatively insensitive in detecting the GM 12 antigen. It is known that GM 12 is present in almost all Blacks in general.[18] Further, with rare exceptions, GM 12 always occurs when the allotype GM 4 is present. Therefore, the fact that GM 12 was not detected in the sera

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[18]Both the victim and defendant Howard in that case were black. In the present case, the victim was black but the petitioner is Caucasian.

from either the victim or the suspect, when it should have been present genetically, indicates that the system used was insensitive in detecting the GM 12 antigen.

...The absence of the GM 12 antigen can only be confirmed by testing for the GM 21 antigen, which was not available commercially at the time these tests were performed. It should be noted that the tube technique is not very sensitive, and in recent years has been replaced by more (*25) sensitive methods. In an [sic] of itself, the lack of sensitivity of the method, does not invalidate the results for antigens detected.

8. ... I am not convinced that the conclusions stated in [Dr. Shaler's] report can be made. The retesting performed on the jockey shorts and the serum of [another suspect] are not comparable. One is a stain of unknown concentration, while the other is serum. Further, in the absence of a positive result to confirm the negative reaction for the GM antigen 12, without additional documentation, I believe that the conclusion that the stain and [the other suspect] have different phenotypes is tenuous.

In a 1988 hearing in the Howard case, Dr. Shaler acknowledged that:

1. One cannot validate a negative

> results for GM 12 without testing for another factor on the same subclass of molecules;
>
> 2. He did not type for any other factor on the same subclass in this case involving petitioner;
>
> 3. His negative results for GM 12 could have been false negatives in this case.

In support of petitioner's Ky. CR 60.02 motion, petitioner's counsel filed an affidavit concerning a 1993 interview in New York with Dr. Shaler concerning this case. Essentially, the affidavit reflects that Dr. Shaler now concedes that "additional posttrial scientific research concerning the detection of genetic markers in dried blood indicates that the dried blood found on [petitioner's] boots indeed could have come from either [petitioner] o Dudley, and that he was mistaken when he testified that the blood could not possibly have come from [petitioner]." Brown v. Commonwealth, No.

93-CA-1861-MR, p. 5 (Ct. App. 1994), Record at 133. In addition, counsel's affidavit reflects that Shaler admitted that the application of GM testing to dried blood was novel and not commonly accepted in 1976, that his testimony that the test was reliable was (*26) mistaken, and that he would not have testified had he known about the problems with the anti-sera and the technique at the time.

The admissibility of evidence is a matter of state law. As previously stated, alleged errors of state law rarely serve as a basis for federal habeas corpus relief, and do so only when the petitioner was denied fundamental fairness in the trial process. Estelle v. McGuire, 502 U.S. 62, 67 (1991); Clemmons v. Sowders, 34 F.3d 352, 357-58 (6th Cir. 1994). In addition, the rulings of a state's highest court with respect to state law are bind-

ing on the federal courts. See Smith v. Sowders, 848 F.2d 735, 738-39 (6th Cir.), cert. denied, 488 U.S. 866 (1988).

In making a determination of whether a defendant's right to a fundamentally fair trial has been violated, courts should examine the materiality of the erroneously admitted evidence. In an analogous context concerning the omission of exculpatory evidence, the Supreme Court has instructed:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is

> already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976) (footnotes omitted). If there is constitutional error, the court must determine whether the error "had a substantial or injurious effect (*27) or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 610, 637 (1993). "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992, 992 (1995). See also Dey v. Scully, 962 F.Supp. 1521 (E.D.N.Y. 1997) (granting petition in part based upon conclusion

that evidentiary ruling deprived defendant of fair trial).

Petitioner first protested the admission of Dr. Shaler's testimony on direct appeal. As previously discussed, in its original 1982 opinion the Supreme Court of Kentucky first held that the evidence **without Dr. Shaler's testimony** was sufficient to support petitioner's conviction. However, the court went on to summarize Dr. Shaler's testimony as follows:

> [T]he presence of [GM] No. 12 served to differentiate Jim Brown's blood from that found on his boots and in Dudley's clothing. It was possible, therefore, that the blood on the boots came from Dudley, but not possible that it came from Brown. Testifying in chambers prior to the admission of this testimony before the jury, Dr. Shaler explained the development of the GM system and gave his professional opinion that it is reliable. Though counsel for Brown was at some disadvantage in having had a limited time to prepare himself on the subject, he conducted a skill-

ful and penetrating cross-examination in the presence of the jury which was well-calculated to make the point that this particular method of blood-testing is more or less in its infancy in this country and has not yet come into general acceptance and use.

Our opinion is that the only valid argument to be made against the Shaler evidence is addressable to its credibility rather than its admissibility. "Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." McCormick, Evidence, 203 (2d ed. 1972). It is not to be likened to the lie-detector test, the (*28) results of which depend heavily on the skill of the operator, and in which factors other than truthfulness are known to affect the result. Dr. Shaler's testimony was admissible on the same basis as any other expert opinion.

We were at first somewhat disturbed by the trial court's refusal to grant a continuance in order for defense counsel to research the blood-grouping theory. Defense counsel spoke with Dr. Shaler on Saturday before the trial commenced on Monday. At that time, Dr. Shaler indicated a hesitancy to testifying stating that his tests were inconclusive. He had been contacted by the Commonwealth only

> on Friday, and continued testifying throughout the weekend. Defense counsel was certainly aware that he might testify, yet made no motion for a continuance until the Commonwealth called Shaler as its last witness. Moreover, when presented with the opportunity during cross-examination, defense counsel failed to question Shaler about the doubts expressed in the Saturday conversation. We cannot conclude that Jim Brown was unfairly prejudiced by the trial court's refusal to grant a continuance.

Brown, 639 S.W.2d at 760-61. Of course, in 1982 when the state court reached its conclusions, it did so without benefit of the new evidence recently presented by petitioner.

After reviewing the new evidence in support of petitioner's CR 60.02 motion, the majority of the Supreme Court of Kentucky denied the motion in large part because of the court's 1982 conclusion that the circumstantial evidence excluding Dr. Shaler's testimony was sufficient to

support the conviction. In its 1996 opinion, the court further noted that the trial court had described the evidence as "overwhelming" in denying the CR 60.02 motion. 932 S.W.2d at 361. The court concluded that petitioner had failed to prove the outcome would have been different if all of Dr. Shaler's testimony had been excluded or if it had been admitted and Shaler's later misgivings had been available to the jury at the time of trial. Id. at 362. The majority relied upon "ample circumstantial evidence in (*29) the record" to reach its conclusion, finding in addition that Dr. Shaler's testimony "appears not to have been an important item of evidence." Id. The court found that Brown's claim that Dr. Shaler was the key witness was

> severely undermined by the conduct of counsel who defended appellant at trial and of the Commonwealth

> Attorney who prosecuted the case. Neither even referred to Dr. Shaler or his testimony in closing argument to the jury.

Id.

Petitioner argues that this court should disregard the findings and conclusions of the majority of the Supreme Court of Kentucky in favor of the opinion expressed by the dissenting state court justices. The dissent asserted that both the trial court and the majority had mischaracterized the evidence against the petitioner, and that there was a likelihood that Dr. Shaler's "highly persuasive scientific evidence" changed the result at trial." Id. at 363. I agree with the dissent that:

> An "aura of special reliability and trustworthiness," surrounds scientific or expert testimony in the eyes of a jury, especially within the context of a criminal trial. Hester v. Commonwealth, Ky., 734 S.W.2d 457 (1987) (citation omitted). Dr. Shaler positively

> excluded James Brown as the source of the blood stain on James Brown's suspicious boot and, as the Majority Opinion fails to mention, just as positively identified the victim, Bryant Dudley, as one of about four sources in a hundred candidates. For this jury in this trial, there were only two relevant sources of the relatively rare blood: James E. Brown III and Bryant Dudley. According to Dr. Shaler, it was impossible that the blood came from James Brown and the odds that it came from Bryant Dudley were high. Dr. Shaler's unequivocal exclusion of James Brown as the blood source provided a compelling link connecting James Brown to the brutal murder of Bryant Dudley.

Id. at 365. In addition to the observations made by the dissent, I would note that the timing of Dr. Shaler's testimony as the last (*30) witness called by the prosecutor seems to have been a strategic trial decision by the prosecutor calculated to add even greater weight to the testimony in a heavily circumstantial case.

With respect to the majority's con-

clusion that Dr. Shaler's testimony was not an important item of evidence, petitioner again argues persuasively that Dr. Shaler's testimony was not referred to in closing arguments by the defense because counsel did not want to draw attention to damaging evidence. On the other hand, although the prosecutor did not use Dr. Shaler's name, the Kentucky court erred in stating that he did not refer to Dr. Shaler's testimony. The prosecutor in closing twice referred to the evidence of blood on Jim's boots, and clearly alluded to the expert's testimony when he referred to the fact that "one out of 25 people who had the blood that Bryant Dudley had was found on Jim Brown's boots."

In addition, as noted by the dissent, the majority's conclusion that the evidence was unimportant is undermined by

its previous characterization of the same evidence on direct appeal. In 1982, the state court equated Dr. Shaler's testimony regarding the blood on James Brown's boots to testimony in Mark Brown's trial that Mark Brown had admitted he killed Bryant Dudley. Brown, 639 S.W.2d at 759. "Evidence equivalent to an admission of guilt is by no means unimportant." Id. In fact, Dr. Shaler's testimony offered "the only direct evidence connecting James Brown to the murder . . . ." Id. at 366.

Whether the admission of Dr. Shaler's testimony in this case resulted in the denial of fundamental fairness to petitioner at trial is admittedly a close issue. This court's analysis is (*31) constrained by the prior review of the courts of Kentucky, which have repeatedly upheld the admission of Dr. Shaler's testimony under state law and which have

previously concluded on two separate occasions that the evidence without Dr. Shaler's testimony was more than sufficient to support petitioner's conviction under state law. Nonetheless, a different conclusion may be reached by this court where the state court decisions are "contrary to, or [involve] an unreasonable application of, clearly established Federal law," or are "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. §2254(d). If petitioner were not otherwise barred from asserting this claim at this time, I would hold that petitioner's claim regarding the admission of Dr. Shaler's testimony merits habeas relief. Contrary to the state court, I believe that the admission of Dr. Shaler's testimony was not only clear error, but that it had a substantial and injurious

effect on the jury's verdict.

E. Denial of Continuance

Petitioner also argues that the trial court's denial of this motion for a continuance deprived him of a fair trial in violation of his due process rights. The Commonwealth called Dr. Shaler as a surprise last witness on the second day of trial. Petitioner immediately moved for a continuance of two to three days or, at least until the next day, so that he could examine Shaler's report and consult with other experts about the blood testing procedures. Counsel had only received the report that morning. However, the trial court overruled the motion for a continuance, remarking that defense counsel and the prosecutor were equally unfamiliar with (*32) Shaler's testimony. Because of the trial court's ruling, petitioner's counsel was forced to cross-

examine Shaler only a few hours after receiving his expert report, having reviewed the report over a lunch break.

Petitioner argues that the trial court's denial of his motion for a continuance resulted in a denial of due process. Petitioner asserts that the continuance was sought in order to adequately confront the witness against him, where Shaler was a surprise witness and where there was no negligence by petitioner and no prior adjournments of trial. Petitioner argues that he was unduly prejudiced and that the trial court abused its discretion in denying the motion, because he had such limited time to review the report or prepare for cross-examination, with no opportunity to engage an expert witness for rebuttal.

With respect to this issue, the Supreme Court of Kentucky indicated that it was

"somewhat disturbed" by the denial of the continuance, but noted that Dr. Shaler had only been contacted by the Commonwealth on Friday, and that defense counsel had spoken to Dr. Shaler on the Saturday before trial. During that conversation, Dr. Shaler apparently indicated that he was unwilling to testify because his test results were not conclusive. T.E. 135. The state court noted that counsel was aware that Shaler might testify, but failed to move for a continuance until Shaler was called, and did not cross-examine Shaler about the doubts he had expressed in the Saturday conversation. The court concluded that petitioner was not unfairly prejudiced by the trial court's ruling, noting that overall the cross-examination was "skillful and penetrating."

(*33) "The matter of a continuance is traditionally within the discretion of the

trial judge, and it is not every denial for a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." Ungar v. Sarafite, 376 U.S. 575 (1964). A denial of a continuance amounts to a constitutional violation only where there is an unreasonable and arbitrary insistence upon expeditiousness on the part of the district court in the face of a justifiable request for delay. United States v. Moreno, 933 F.2d 362, 271 (6th Cir.), cert. denied, 112 S.Ct. 265 (1991) (citing United States v. Mitchell, 744 F.2d 701, 704 (9th Cir. 1984)).

The appropriateness of a continuance is evaluated on a case-by-case basis. Among the factors considered in determining whether the denial of a continuance was an abuse of discretion are the length of delay; previous continuances; inconven-

ience to litigants, witnesses, counsel, and the court; whether the delay is purposeful or caused by the accused; the availability of other competent counsel; the complexity of the case; and whether denying the continuance will lead to identifiable prejudice. See Wilson v. Mintzes, 761 F.2d 275, 281 (6th Cir. 1985). In determining whether a defendant can demonstrate actual prejudice as a result of a denial of a continuance, the court will consider whether the additional time would have produced more witnesses or have added something to the defendant's case. See United States v. Martin, 740 F.2d 1352, 1361 (6th Cir. 1984).

" 'When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse (*34) of discretion but it must have been so arbitrary and fundamentally unfair

that it violates constitutional principles of due process.'" Bennett v. Scroggy, 793 F.2d 772, 774 (6th Cir. 1986) (quoting Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981). "There must also be some showing that granting the continuance would have furthered the court's attempt to secure a just determination of the cause." Id. (citing United States v. Fearwell, 595 F.2d 771, 780 (D.C. Cir. 1978). In addition, pursuant to amendments to 28 U.S.C. §2254(d) as cited previously, petitioner's claim that the denial of a continuance violated his due process rights must be dismissed unless the state court's determination of this claim "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the

evidence presented in the state court proceeding."

As with petitioner's claim regarding the admission of Dr. Shaler's testimony, his claim regarding the denial of a continuance would provide grounds for habeas relief were he not otherwise barred from raising it. Petitioner argues that a short continuance would have permitted counsel to further examine Dr. Shaler's report and consult with other experts about the blood testing procedures. Certainly, Dr. Shaler's post-trial admissions concerning the inaccuracy of his tests results in this case reinforce the importance of permitting defense counsel adequate time to research and prepare for cross-examination. However, countering this twenty-twenty hindsight is the fact that petitioner does not contend that he would have called any specific

expert to rebut Dr. Shaler's testimony, and (*35) does not indicate any specific testimony that he would have attempted to elicit on cross-examination at the time but could not due to the denial of the continuance.

As with its characterization of Dr. Shaler's testimony as unimportant, the Kentucky court's characterization of defense counsel's cross-examination as "skillful and penetrating" is somewhat suspect. Although this court has reviewed the cross-examination and finds it to be adequate **under the circumstances**, it is doubtful that Socrates could have conducted a "skillful and penetrating" cross-examination of this scientific witness with so little time for preparation.

I agree with the Kentucky court that the trial court's refusal to grant the

continuance is disturbing. In this court's experience, the testimony of such an expert in a trial in which all of the evidence is circumstantial is often given great deference by a jury. If petitioner were not otherwise barred from asserting this claim at this date, I would conclude that the denial of the continuance was so prejudicial as to violate petitioner's due process rights. Applying the new standards of §2254(d), the state court's dismissal of this claim appears contrary to federal law and based on an unreasonable determination of the facts in light of the evidence presented.

F. Change of Venue

In another challenge to the rulings of the trial court, petitioner argues that he was denied due process by that court's denial of his petition for a change of venue prior to trial. Petitioner argues

that the venire procedures and trial illustrate (*36) that he did not receive a fair trial due to the failure of the trial court to grant his motion. One hundred fourteen veniremen were called for trial; eighty-four were stricken for cause. Of the remaining veniremen, the Commonwealth used five peremptory challenges and the defense used fourteen. Petitioner argues that he complied with state statutory provisions to support a change of venue and that the motion should have been granted because the Commonwealth filed no response to the motion.

Petitioner attached numerous affidavits to his motion for a new trial, arguing that the record reveals a prejudicial atmosphere. When petitioner's counsel delivered his opening statement, the record reflects that he was twice interrupted by "outbursts from spectators"

and that the judge admonished those in the courtroom after the second outburst. Six law enforcement officers submitted identical affidavits which noted that during the course of trial, "several hundred black people gathered inside and outside the courtroom," that during jury deliberations, "the crowd of blacks became extremely noisome and unruly," and that "many" shouted obscenities at the jury and threatened that Maysville would burn if the defendant was not found guilty. The officers further stated that it was necessary to have many law enforcement officers present during trial and to have the petitioner escorted by at least eight policemen when he was returned to jail. Finally, each of the affiants states that he has "never seen a criminal trial conducted in such a disruptive, hostile, and intimidating environment."

The Commonwealth notes that no response was filed to the motion for change of venue because it was filed and set for hearing at (*37) 10:00 a.m. of the same day. The Certificate of Service states that the motion was mailed that day to the Commonwealth. The trial court deferred ruling on the motion until the jury was selected, and a jury was seated without any further objection by petitioner. Petitioner's motion for new trial, which was based solely on the venue issue, was denied by the trial court because it was untimely filed. The Supreme Court did not directly address petitioner's change of venue argument in its 1982 opinion, concluding only that it found "no merit in the remaining issues" raised on direct appeal.

The Commonwealth asserts that petitioner has procedurally defaulted on

his venue claim due to his failure to timely file his motion for a new trial. In addition, the Commonwealth argues that the absence of any objection to the jury selection process indicates petitioner's satisfaction with the jury.

Petitioner argues that the Commonwealth should not be permitted to raise an argument concerning procedural default at this stage of the proceedings. See Workman v. Tate, 957 F.2d 1339, 1344 (6th Cir. 1992); United States ex rel. Williams v. Washington, 913 F.Supp. 1156, 1160 (N.D. Ill. 1995), aff'd 108 F.3d 1380 (1987) (Table, text available on Westlaw).

Workman v. Tate is clearly distinguishable, in part because it involved the doctrine of exhaustion rather than procedural default. In Workman, the petitioner's claims were still pending in state court. However, the Sixth Circuit

found that the district court had properly considered the petition on its merits despite the lack of exhaustion, because the state had failed to raise the nonexhaustion defense when it initially answered the petition, and because (*38) petitioner's state court petition had languished for more than three years in state court without a decision. Although the court's decision in United States ex rel. Williams v. Washington, concerns procedural default, that case is similarly distinguishable. In that case, the court held that the state had "waived waiver" due to its failure to raise that defense in its response to the petition.

Unlike Workman and Williams, in this case the respondent raised the defense of procedural default in its response to the petition and cannot be said to have delib-

erately waived the defense.[19] In addition, the state trial court expressly relied on the procedural bar in denying petitioner's untimely motion for a new trial, and the Supreme Court of Kentucky affirmed that denial without specific discussion. Under these circumstances, I conclude that petitioner has procedurally defaulted his venue claim. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (holding that where the last reasoned state judgment applies a procedural bar, later unexplained orders upholding that judgment are presumed to rest on the same ground). As petitioner

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19See also Henderson v. Thieret, 859 F.2d 492 (7th Cir. 1988) (holding that a district court may properly raise and consider the question of procedural default sua sponte unless the state has indicated a desire to waive that defense); compare Rice v. Marshall, 816 F.2d 1126, 1128-29 (6th Cir. 1987) (holding that procedural default should not be raised sua sponte where state courts have not enforced procedural rule and respondent has not raised the defense of procedural default).

has not shown cause and prejudice for his default, the claims should not be addressed on its merits by this court.

Even if this court were to reach the merits of the claim, petitioner cannot show that he was deprived of a fundamentally fair trial due to a prejudicial atmosphere. The record indicates that (*39) the trial court quickly and effectively stifled the only outbursts which occurred in the courtroom, and there is no evidence that the voir dire was inadequate to safeguard petitioner's right to an impartial jury.

G. Admission of Hearsay Testimony

Petitioner argues that hearsay statements made by his brother, Mark Brown, were improperly admitted and were so prejudicial as to deprive him of a fair trial, even though the statements did not implicate petitioner but instead impli-

cated his brother. Petitioner moved to suppress the statements prior to trial, but the court overruled his motion, holding that the statements were admissible under an exception to the hearsay rule because they were made in the presence of petitioner. Upon petitioner's objection at trial to the admission of the statements, the court ruled that a conspiracy exception applied. On direct appeal, the Supreme Court declined to specifically address the issue, instead concluding only that it and other issues not specifically addressed had "no merit."

Petitioner argues that the first exception to the hearsay rule which was relied on by the trial court was not applicable, because in order for hearsay statements made in the presence of petitioner to be admissible, they must have been directed at him or been of a na-

ture demanding some response. Petitioner argues that the second "conspiracy" exception was likewise inapplicable, because there was no evidence of a conspiracy.

Specific statements to which petitioner objects are the admission of testimony by Robert Collins that Mark said "someone broke in his house ... a thousand dollars worth of drugs had been (*40) taken from his house," that Mark had interrogated Dudley regarding the break-in, that Mark approached Collins after the victim had disappeared and said that "he wanted to look for Bryant's body," and that Mark told Collins he had buried one of his guns. Mark Brown did not testify at trial.

Petitioner argues that the admission of the hearsay statements implicating his brother violated his right to confront the witnesses against him, because the

statements were inculpatory to him due to his relationship to his brother. Even if the hearsay statements would have been admissible under an exception to the hearsay rule, petitioner contends that they were so lacking in indicia of reliability that cross-examination was constitutionally required. See Dutton v. Evans, 400 U.S. 74 (1970).

As with petitioner's other claims regarding the admissibility of evidence under Kentucky law, petitioner's claim regarding the admission of hearsay will serve as the basis for federal habeas corpus relief only if he was denied fundamental fairness at trial. Estelle v. McGuire, 502 U.S. at 67. In this case, it is clear from the evidence presented that the Commonwealth's theory of the case was that Mark Brown and petitioner participated in a conspiracy to kill

Bryant Dudley, so that the statements of Mark Brown were properly admitted. The Supreme Court of Kentucky concluded in Mark Brown's appeal on essentially the same facts that a conspiracy existed. Brown v. Commonwealth, 555 S.W.2d 252, 256 (Ky. 1977). Although petitioner was not formally indicted on a conspiracy charge, much of the evidence presented at petitioner's trial evinced a mutually understood community of purpose between Mark and James (*41) Brown to kill Bryant Dudley; thus, the hearsay was properly admitted under the co-conspirator exception to the hearsay rule. See Ohio v. Roberts, 448 U.S. 56, 66 (1980); United States v. McLernon, 746 F.2d 1098 see also Boone v. Marshall, 760 F.2d 117 (6th Cir. 1985) (affirming denial of writ of habeas corpus and holding that testimony concerning statements made by petitioner's

brother which implicated petitioner as murderer did not violate petitioner's right of confrontation).

H. Closing Argument

As a final ground for relief, petitioner argues that he may have been convicted on the basis of an improper closing argument. Petitioner objects to three tactics taken by the prosecutor: 1) the prosecutor's "probability" argument in which he attached random numerical values to the probability of certain things happening in Mason County and argued that the "odds on innocence" were one in a billion; 2) alleged misstatements of evidence which characterized things done by petitioner's brother as done or said by both brothers; and 3) an alleged comment on petitioner's right to remain silent.

The respondent argues that none of the alleged improprieties by the prosecutor

provide grounds for habeas corpus relief, because petitioner failed to make any objection to the prosecutor's closing argument at trial and therefore should be procedurally barred from raising the issue in this court. Under Kentucky law, a contemporaneous objection is necessary to preserve an issue for appellate review. Ky. RCr 9.22. Although petitioner presented the same argument on direct appeal, the Supreme Court did not (*42) specifically address it, but instead grouped it together with "remaining issues" in which it found "no merit." Petitioner did not present the issue in his Ky RCr 60.02 motion.

The respondent contends that although the state court did not expressly rely on the procedural bar but arguably reached the merits, this court should apply the state's procedural bar. In Ylst v. Nunn-

emaker, the Supreme Court held that where the last state court to review an issue does not rely upon the procedural bar but instead reaches the merits of a claim, any procedural bar is removed so long as the relevant state court decision "fairly appear[s] to rest primarily on federal law or [is] interwoven with [federal] law." Id., 501 at 802 (quoting Coleman v. Thompson, 501 U.S. 722, 740 (1991)). Respondent argues that this court should apply the procedural bar because nothing in the decision of the Supreme Court of Kentucky indicates that its rejection of petitioner's claim on direct appeal rested on federal law rather than solely on state law.

I agree with the respondent's conclusion, though on alternative grounds. Unlike the respondent, I would not characterize the state court's one sen-

tence conclusion that it found "no merit in the remaining issues" as a rejection on the specific merits of the prosecutorial misconduct claim. Instead, I find that the state court declined to reach the issue, and was silent as to the reason for its rejection of appellant's argument. There is simply no indication in the opinion as to whether the state court found "no merit" due to the procedural bar which was argued by the appellee on direct appeal, or whether the court found "no merit" on substantive (*43) grounds.

Where the state court is silent as to the basis for its rejection of a claim, the federal court should "not assume that the court did not observe the applicable procedural bar." Simpson v. Sparkman, 94 F.3d 199, 203 (6th Cir. 1996). Instead, the court should assume that had the state court specifically addressed the claim,

"it would not have ignored its own procedural rules and would have enforced the procedural bar." Id. Alternatively, as suggested by respondent, even if the state court's opinion should be viewed as a comment on the substance of petitioner's claim, the Harris v. Reed[20] presumption would not apply because the opinion does not rest on federal law. In either case, petitioner is procedurally barred from raising his prosecutorial misconduct claim in this court, due to his failure to object to the closing argument at trial.

Petitioner argues that this court should reach the merits of his claim because he asserts a claim of actual innocence. A court may review a claim even

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[20]489 U.S. 255, 262 (1989), holding that if the last state court to be presented with a particular federal claim reaches the merits, it presumptively removes any bar to federal court review that might otherwise have been applicable.

in the absence of a showing of cause and prejudice where a constitutional violation has probably resulted in the conviction of an innocent person, or if petitioner can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. See Murray v. Carrier, 477 U.S. 478, 496 (1986); Coleman v. Thompson, 501 U.S. 722 (1991).

To establish such a claim, a petitioner must "show that 'a constitutional violation has probably resulted in the conviction of (*44) one who is actually innocent."' Schlup v. Delo, 115 S.Ct. 851, 867 (1995) (quoting Murray v. Carrier, 477 U.S. at 496)). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. The petitioner must show that he is factually,

as opposed to legally, innocent of the crime for which he was convicted. See Montgomery v. Meloy, 90 F.3d 1200, 1205 (7th Cir.), cert. denied, 117 S.Ct. 266 (1996); Johnson v. Hargett, 978 F.2d 855, 859-60 (5th Cir. 1992), cert. denied, 507 U.S. 1007 (1993); Rodriguez v. Johnson, 104 F.3d 694, 699 (5th Cir. 1997); Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994). Under the AEDPA, 28 U.S.C. §2254(e) now appears to raise the Schlup burden of proof of innocence to an even higher "clear and convincing" evidence standard.

In this case, petitioner has presented no evidence to persuade the court that he is probably innocent; in fact, he has failed to demonstrate even a colorable claim of probable actual innocence. Therefore, there are no grounds of which to overlook petitioner's procedural default. See Rust v. Zent, 17 F.3d at 162;

compare Lambert v. Blackwell, 962 F.Supp. 1521 (E.D. Pa. 1997) (granting petition in light of clear and convincing evidence of actual innocence).

I have concluded that petitioner's claim is procedurally barred and therefore need not be reviewed in this proceeding. Moreover, I have concluded that petitioner has failed to demonstrate grounds for this court to overlook his procedural default. However, the court will briefly review the merits of petitioner's claim should a (*45) reviewing court disagree with my conclusion that the claim has been defaulted.

As to the first argument objected to by petitioner, the prosecutor began by discussing evidence of the similarity between the tire marks found at the scene of the body and the tire treads made by petitioner's car:

I think ladies and gentlemen that probably one out of 20 tires sold in Mason County, might be same Uniroyal tire of this same tread and design. We don't ask you to convict anybody on that. Found a Michelob beer can out there. The only can around where this killing took place. That doesn't mean much, except they also found Michelob beer cans in Mark Brown's refrigerator. Lot of people drink Michelob beer. Maybe one out of fifty beer drinkers. Most of them drink Strohs, Budweiser, , but lot of people drink Michelob, one out of 50. Let's say 1 out of 20. Of course, everybody in Mason County doesn't drink beer. It might not be 1 out of 10 people in Mason County that drinks beer, but we are talking about 1 out of 200. Let's say 1 out of 20. Got a Michelob beer can, just two coincidences, but he still hasn't killed anybody. But the chance of two coincidences, the tire print 1 out of 20, and the beer can 1 out of 20, makes one out of 400, but there is till 1 out of 400 chances that he is not guilty. There is a paper towel out there, and it has got blood on it, and in Mark Brown's apartment where Bryant Dudley was the last time he was seen alive is a roll of paper towels, just exactly the same design. You may look at them. It could have come off that roll. It didn't have to. Mark Brown isn't the only person in Mason County who busy that particular paper towel

with that particular kind of design. I don't know how many different kind of towels we have got. Great Northern, different designs on different companies, but let's say that 1 out of 10 people that buy paper towels in Mason County, buys that particular kind of towel with that particular design. Another coincidence, 1 out of 10, plus 1 out of 400, means there in one out of 4000 chances he is not guilty. Bryant Dudley was shot in the back, and that is not a very nice way to kill a man, with a shotgun. He was shot twice. Two bullet holes right side by side from 6 to 15 feet, I have forgotten. Two bullet holes. Ladies and gentlemen, those on the jury that know anything about guns know if you shoot somebody with a shotgun, cock it back again and put another one in there, and you shoot him again, you have blown him so far the first time that you are not going to have two bullet holes side by side. You will (*46) have one here and one someplace else. You are going to knock him. These were together. Now what does that mean. It means that there is not so much doubt that he was shot with a double barreled shotgun with which you pull both triggers at the same time. That is the only way you are going to get that kind of bullet holes, by shooting him twice at one time. Lot of people have double barreled shotguns and carry them in their car. How may people carry

> double barrel shotguns in the boot of their car and are going to show up in Lexington the day after this killing with a double barreled shotgun in their car? One out of 50? One out of 50 divided by 1 out of 4000, is one out of 200,000, but here is still a one out of 200,000 chances that Jimmy Brown is not guilty. He was shot with No. 6 Federal shells, No. 12 gauge shotgun Federal shells. I do not know how many different shells there are. How many people would happen to have Western shell, I'm sorry, Federal shells, No. 6, 12 gauge, if they had shotgun shells? One out of a 1000, one out of a 100, one out of 50? What have we got 200,000 times 50. That is one in a million chances that he didn't do it. How many people drive to Lexington and trade off bloody boots the day after the murder? Ladies and gentlemen, we are so far over one in a billion now, that one out of ten calls and says I will be there late, instead of 5:00 at night. There is no use mentioning the one out of 20,000 people in Mason County who go out looking for a body on Morton Lane on Friday after the murder was committed. There is no use mentioning all of the other one out of 25 people who had the blood that Bryant Dudley had was found on Jim Brown's boots.

T.E. 199-200. Petitioner argues that this was improper argument which has been

repeatedly condemned by courts. See People v. Collins, 68 Cal.2d 319, 438 P.2d 33 (1968) (reversing conviction where testimony of mathematics professor pertaining to probabilities was improperly admitted, and where prosecutor argued that the chance of the crime having been committed by other defendants was "somewhat like one in a billion").

The respondent contends that the prosecutor's comments amounted to proper argument on the sufficiency of the evidence, because the comments merely reflected upon "the unique combination of evidence which linked petitioner to the crime." Cf., Alexander v. (*47) Commonwealth, 457 S.W.2d 472 (1970). I disagree. On the contrary, the argument made by the prosecutor in this case went far beyond comment on the unique combination of evidence. Instead, peti-

tioner is correct in characterizing the argument as improper. See People v. Collins, supra; United States v. Massey, 594 F.2d 676, 681 (8th Cir. 1979); contrast United States v. DiGiacomo, 680 F.2d 515 (7th Cir. 1982).

I concluded that petitioner would be entitled to relief on this claim were he not procedurally barred from raising it. The prosecutor's comments in this case were far from isolated, and were so egregious as to render the trial fundamentally unfair in violation of the due process clause. "'Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.'"; United States v. Bond, 22 F.3d 662, 667 (6th Cir. 1994) (quoting United States v. Young, 470 U.S. 1, 11-12 (1985)). In light of the im-

proper admission of Dr. Shaler's testimony and denial of the continuance, this was not an "otherwise fair" trial. The prosecutor's comments in this case were not only inappropriate, but would constitute grounds for habeas relief were petitioner not otherwise barred from presenting this claim.

The second type of argument made by the prosecutor which petitioner alleges was improper was the prosecutor's use of the plural when describing things Mark Brown allegedly did or said to incriminate himself. Petitioner argues that the prosecutor's argument impermissibly tried petitioner for his brother's words and deeds. For example, the prosecutor argued:

> (*48) ... And that afternoon or night, Mark Brown and Jimmy Brown picked up Bryant Dudley in their car and stick a gun in his face, and Jim Brown is right there, and said, "What did you do with our dope?" "Tell us, or else" Tuesday,

> Robert Collins, said "Let me out of the car." And they do, and apparently they let Bryant Dudley out, because he wasn't to be killed that night. Tuesday, they come over on Fourth Street, they see Chan Warner and Earl Black, who said, they said, "We know who stole our stuff, and we are going to get him. Where is Bryant Dudley?" They drive up to Petie Corde's house, where Bryant Dudley was, pick him up about 10:30, and say "We want to try out some new chemicals," and they take him to their apartment. ... Mark Brown Jim Brown and Bryant Dudley, together, Bryant Dudley with the two boys that had threatened to kill him the night before, telling other people they were going to kill whoever ripped them off, from that time, Bryant Dudley was never seen alive again.

Petitioner argues that the prosecutor's closing grossly misstated the evidence because the "dope" belonged to Mark Brown, not to petitioner. Moreover, it was Mark Brown and not petitioner who threatened the victim and said he was going to "get" him.

The respondent argues that the prosecutor's comments were not overly pre-

judicial, because petitioner and Mark were together at every crucial step leading to the murder. While Mark did most of the talking, petitioner never disagreed and at times joined in. As the Supreme Court stated in upholding Mark Brown's conviction, their conduct "clearly evinced a mutually-understood community of purpose." Brown v. Commonwealth, 555 S.W.2d at 256. Taken alone, the prosecutor's misleading comments would not be grounds for relief, but taken as a whole, the misstatements would add to petitioner's grounds for relief.

Finally, petitioner argues that the prosecutor improperly commented on his failure to testify. I disagree with petitioner as to the propriety of the prosecutor's comment in this instance.

(*49) The prosecutor stated:

> Let me talk to you just a minute about his [defense counsel's] case. Ladies and gentlemen, he didn't have a case. Mr. Gallenstein put on 8 witnesses, good witnesses, good people, and not one of them told you that he didn't do it. Not one of them told you one thing that would indicate that he didn't do it. Not one of them said anything that would cast any doubt on the fact that he did it. Five of them said he was a nice boy, always been a nice boy as far as I now, and I think that is true, and two of them said Jerry Conley is a liar and drunk, which may or may not be true. ... Not one of them said, "No, Jimmy didn't do it." Not one of the said, "No, there is no question that Jimmy didn't do it" because of some reason. Not one of them. They had no defense, whatsoever. Not one soul has gotten on this witness stand and told you one thing that would lead you to doubt the fact that Jimmy Brown is guilty.

T.E. 195-196. Petitioner argues that the last sentence was a comment on the significance of petitioner's failure to testify; however, taken in context I conclude that the comment reflected only on the testimony of the witnesses pre-

sented by the defense. See Foster v. Commonwealth, 415 S.W.2d 373, 375 (1966), cert. denied, 388 U.S. 914 (1967). In addition, petitioner's own counsel commented far more extensively and specifically on petitioner's failure to testify.

III. CONCLUSION

This petition for writ of habeas corpus should be transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. §1631 and 28 U.S.C. §2244(b)(3) because petitioner previously filed a petition in this court in 1977. In the alternative, the petition should be denied because it is time-barred and raises claims which could have been presented at an earlier date. 28 U.S.C. §§2244(b)(4), §2244(d)(1). Although the petitioner raises serious questions concerning the fundamental fairness of his trial, he is barred by

both new law under the AEDPA and by prior law, including (*50) the doctrine of procedural default, from raising his claims in this forum at this time.

Accordingly, IT IS RECOMMENDED HEREIN THAT respondent's motion to dismiss, or alternatively, motion for summary judgment [Doc. #9] be construed as a motion for a summary judgment and be GRANTED. IT IS FURTHER RECOMMENDED that the petition for a writ of habeas corpus be DENIED, and that this action be dismissed and stricken from the docket.

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the date of service of the same or further appeal is waived. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Poorly drafted objections, general objections or objec-

tions that require a judge's interpretation should be afforded no effect and are insufficient to preserve the right of appeal. See Secretary of Health and Human Services, 932 F.2d 505, 509 (6th Cir. 1991). A party may file response to another party's objections within ten (10) days after being served with a copy thereof. Rule 72(b), Fed. R. Civ. P.

This the " 22 " day of August 1997.

"s J. Gregory Wehrman

J. GREGORY WEHRMAN

U.S. Magistrate Judge

(*51)

FILE COPY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

August 22, 1997

Case Number: 2:97-cv-00030

Kevin McNally

Gail Robinson

A.B. Chandler III

Todd D. Ferguson

Certificate of Mailing by "s LBB ."

James H. BROWN, III, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky

Aug. 31, 1982.

Rehearing Denied Nov. 2, 1982.

Defendant was convicted in the Mason Circuit Court, Richard L. Hinton, J., of murder, and defendant appealed. The Supreme Court held that: (1) evidence as to victim's last being seen in company of defendant and companion, evidence as to shotgun and shells owned by defendant, as well as other evidence, was sufficient to support murder conviction; (2) expert testimony concerning "GM antigenics" in blood found on defendant's boots, in shooting victim's blood, and in defendant's blood was admissible; (3) record established that defendant was not unfairly prejudiced by trial court's refusal to grant continuance; but (4)

requirement that presentencing investigation be made, that considerfation be given to written report of such investigation, and that defendant or his counsel be informed of facts and conclusions of the investigation and afforded opportunity to controvert them were mandatory and had to precede entry of valid judgment.

Judgment vacated and case remanded for resentencing upon compliance with statute.

1. Homicide (key) 250

Evidence as to victim's last being seen in company of defendant and companion, evidence as to shotgun and shells owned by defendant, as well as other evidence, was sufficient to support murder conviction.

2. Criminal Law (key) 488

Expert testimony concerning "GM antigenics" in blood found on defendant's boots, in shooting victim's blood, and in

defendant's blood was admissible, even though testimony showed that such method of blood-testing was more or less in its infancy and had not yet come into general acceptance and use.

3. Criminal Law (key) 1166(8)

Record established that defendfant was not unfairly prejudiced by trial court's refusal to grant continuance to permit defense counsel to research blood-grouping theory upon which prosecution expert witness based his testimony.

4. Criminal Law (key) 986.4(1), 986.5

Requirements that presentencing investigation be made, that consideration be given to written report of such investigation, and that defendant or his counsel be informed of facts and conclusions of the investigation and afforded opportunity to controvert them were mandatory and had to precede entry of

valid judgment. KRS 532.050.

Jack Emory Farley, Public Defender, Kevin Michael McNally, M. Gail Robinson, Asst. Public Defenders, Frankfort, for appellant.

Robert F. Stephens, Atty. Gen. J. Gerald Henry, Asst. Atty. Gen. David A. Smith, Sp. Asst. Atty. Gen., Frankfort, for appellee.

OPINION OF THE COURT

The appellant, James H. (Jim) Brown, III, and his brother, Mark Brown, were jointly indicted for the murder of Bryant Dudley. Cf. KRS 507.020. In a separate trial Mark was found guilty and sentenced to 20 years in prison. His conviction was affirmed by this court in *Brown v. Commonwealth*, Ky., 555 S.W.2d 252 (1977). That opinion will serve as a sufficient background for understanding this case

without a detailed account of the evidence in this opinion.

Jim Brown's separate trial also resulted in a verdict of guilty and a sentence of 20 years' imprisonment, which gives rise to this belated appeal.

With two major differences the evidence in Jim's trial was much the same as it was

in Mark's. Mark was done in by the testimony of Robert Collins, who said that Mark had confided in him and admitted that he and Jim had killed Dudley. This evidence, of course, was not admissible against Jim. In Jim's trial, on the other hand, there was expert evidence that blood found on Jim's boots was not his blood but could have been Dudley's. That evidence was not introduced in Mark's trial.

To summarize the events, it will be recalled that Mark strongly suspected that

Dudley had stolen a quantity of marijuana from his apartment in Maysville, and was threatening to shoot him. On the night of Monday, May 17, 1976, Jim, Mark and Robert Collins went riding in Jim's automobile and picked Dudley up. As they continued riding around with Jim driving, Mark displayed a .45 caliber pistol and, pointing it in the "general direction" of Dudley, questioned him with regard to the theft of drugs from Mark's apartment. Collins became apprehensive and asked that he be taken back to his car, which was done. When Collins parted company with them, Mark, Jim and Dudley were still together. On the next night, Tuesday, May 18, 1976, Jim and Mark were in Jim's car on 4th Street in Maysville and indicated to Chan Warner and Earl Black that they were looking for Dudley. Shortly thereafter they found him at the home of

his girlfriend, Anna Corde, and he left them in Jim's car. Later on, between 11:30 and midnight, four boys came to Mark's apartment but stayed only a few minutes because the Browns were planning to go to Lexington. Dudley was in the kitchen with Mark "snorting something," and appeared to be "high." Jim, on the other hand, was sitting on a chair in the living room and appeared to be normal. So far as we know from the evidence, this was the last time anyone other than Jim and Mark Brown saw Dudley alive.

At 3:00 or 3:30 in the morning (Wednesday, May 19, 1976) Jim and Mark arrived at the apartment of several friends in Lexington, Kentucky, about 65 miles from Maysville, and went to bed on a couch. Wednesday was Jim's usual off-day from work, and he had made similar visits on several previous occasions, usually

arriving, however, on Tuesday evening. Mark had not accompanied him before. Later on during this particular day, after the Brown boys had arisen they played cards and listened to records with some of their hosts, after which Mark cleaned out Jim's car and disposed of some trash. During this activity Mark fired a shotgun which he or Jim, or both, had in the automobile, explaining afterward that he had been testing a defecvtive safety mechanism. Sometime in the middle of the day, around noon or 1:00 P.M., Jim, Mark and a young man named Hutchison went over to Hutchison's nearby apartment and Jim asked Hutchison if he wanted to buy a pair of boots. Hutchison said no, but that he had an old pair he would trade for them. Jim thereupon traded his boots for the old boots, and also traded the shirt he was wearing for one of Hutchison's shirts.

According to Hutchison, Jim gave no explanation for wanting to make these exchanges. Later, however, after Hutchison began to hear rumors (after discovery of the murder, presumably) he took a good look at the boots, which he had not worn, and discovered a stain or stains on them. Eventually, after being questioned by investigative officers, Hutchison turned the boots over to a detective. A laboratory examination disclosed the presence of Type A human bloodstains on the boots. Both Jim Brown and Dudley had Type A blood.

In the early morning hours before daylight on Saturday, May 23, 1976, Mark and Robert Collins borrowed an automobile and went out to the scene of the crime for the purpose of burying Dudley's body, but were unable to locate it. According to Collins, Mark "could not remember where it

was, where they killed him." Jim Brown did not take part in this expedition.

On May 27 Dudley's badly-decomposed body was found by the side of a country lane near Maysville. His death had resulted from two side-by-side shotgun wounds in the back. It was established that these wounds had been inflicted by No. 6-size shot fired from a .12-guage shogun. Pieces of

wadding recovered from the body were identified as having come from Federal brand shotgun shells. Jim Brown owned a double-barreled .12-guage Stevens shotgun that was capable of firing both barrels simultaneously. It had a defective safety-device. There were some Federal .12-guage shells in his mother's home, where he resided. Blood from various objects recovered at the death scene was of Type

A. Tire marks indicating where an automobile had recently stopped were similar to the treads on the tires of Jim Brown's automobile.

[1] It is our opinion that the evidence thus far summarized was sufficient to justify the conviction of Jim Brown in the killing of Dudley at some time during the interval of three hours or so from the departure of the four visitors from Mark's apartment between 11:30 P.M. and midnight on Tuesday, May 18, until the arrival of Mark and Jim in Lexington at 3:00 or 3:30 in the morning of Wednesday, May 19. There was further testimonmy by one Conley, who had been in jail with the Browns in July of 1976 after being arrested for public intoxication, to the effect that they offered him $1,000 to kill Robert Collins, but we do not need to rely upon it in reaching our conclusion with regard to the

sufficiency of the evidence to warrant the conviction. Brown was not entitled to a direct verdict of acquittal. Cf. *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530, 532 (1977).

[2] It is insisted with much vigor that the trial court committed prejudicial error in admitting expert opinion testimony from Robert Shaler, PhD, a research assistant professor at the University of Pittsburgh, reflecting his conclusions with reference to blood samples drawn from Jim Brown as compared with the blood stains on his boots and with blood stains on the victim's clothing. In addition to a doctorate in bio-chemistry, Dr. Shaler had taken graduate training in forensic science, had served for several years as a criminalist and research director at the Pittsburgh and Allegheny County Crime Laboratory, and

since 1974 had been engaged in an LEAA-financed project to study the individualization of blood stains.

The method used by Dr. Shaler in comparing and differentiating blood samples depended on the identification of certain genetic factors in the blood. It is premised uppon the existence of 23 "GM antigenics," some but not necessarily all of which will be consistently present in the serum of an individual person's blood. The laboratory in which Dr. Shaler worked had the capability of identifying three of these, which he designated as GM Nos. 1, 4 and 12. Only No. 4 was found to be present in the blood from Jim Brown's boots and the blood from Dudley's clothing, whereas the blood-sample drawn from Jim Brown contained both No. 4 and No. 12. Hence the presence of No. 12 served to differentiate Jim Brown's blood from that found on his

boots and in Dudley's clothing. It was possible, therefore, that the blood on the boots came from Dudley, but not possible that it came from Brown. Testifying in chambers prior to the admission of this testimony before the jury. Dr. Shaler explained the development of the GM system and gave his professional opinion that is reliable. Though counsel for Brown was at some disadvantage in having had a limited time to prepare himself on the subject, he conducted a skillful and penetrating cross-examination in the presence of the jury which was well-calculated to make the point that this particular method of blood-testing is more or less in its infancy in this country and has not yet come into general acceptance and use.

Our opinion is that the only valid argument to be made against the Shaler evidence is addressable to its credibility

rather than its admissibility. "Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." McCormick, *Evidence*, 203 (2d ed. 1972). It is not to be likened to the lie-detector test, the results of which depend heavily on the skill of the operator, and in which factors other than truthfulness are known to affect the result. Dr. Shaler's testimony was admissible on the same basis as any other expert opinion.

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[3] We were at first somewhat disturbed by the trial court's refusal to grant a continuance in order for defense counsel to research the blood-grouping theory. Defense counsel spoke with Dr. Shaler on Saturday before the trial commenced on Monday. At that time, Dr. Shaler indicated

a hesitancy to testify, stating that his tests were inconclusive. He had been contacted by the Commonwealth only on Friday, and continued testing throughout the weekend. Defense counsel was certainly aware that he might testify, yet made no motion for a continuance until the Commonwealth called Shaler as its last witness. Moreover, when presented with the opportunity during cross-examination, defense counsel failed to question Shaler about the doubts expressed in the Saturday conversation. We cannot conclude that Jim Brown was unfairly prejudiced by the trial court's refusal to grant a continuance.

[4] We find no merit in the remaining issues related to the conduct of the trial. However, one procedural exercise remains. KRS 532.050 requires a presentencing invesigation and consideration of a written report of such

investigation. The trial court is required also to inform the defendant or his counsel of the facts and conclusions of the investigation and afford him opportunity to controvert them. The record does not disclose whether an investigation or report was requested or considered. The requirement is mandatory and must precede the entry of a valid judgment. *Brewer v. Commonwealth*, Ky., 550 S.W.2d 474 (1977).

The judgment is vacated and the case remanded to the Mason Circuit Court for resentencing upon compliance with KRS 532.050.

All concur except STEPHENS, J., not sitting.

[West keynumber system].

James H. BROWN, III, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.
No. 94-SC-1036-DG
Aug. 29, 1996.

Rehearing Denied Nov. 21, 1996.

Defendant was convicted in the Mason Circuit Court, Richard L. Hinton, J., of murder, and he appealed. The Supreme Court, 639 S.W.2d 758, cert. denied, 460 U.S. 1037, 103 S.Ct. 1428, 75 L.Ed.2d 788, vacated and remanded for resentencing. Following sentencing, defendant moved to set aside conviction on ground that Commonwealth's medical expert had indicated to defense counsel that portions of his testimony at defendant's trial could have been erroneous. The Circuit Court, denied motion, and defendant appealed. The Supreme Court, Kevin Hable, Special Justice, held that inclusion of

expert's misgivings in evidence, or exclusion of expert's testimony from original trial altogether, would not, with reasonable certainty, have altered outcome.

Affirmed.

Jackson W. White, Special Justice, filed dissenting opinion in which Lambert and Stumbo, JJ., joined.

1. Criminal Law (key) 998(5)

Rule providing for postconviction relief for "any other reason of an extraordinary nature justifying relief" may be invoked only under most unusual circumstances, and relief should not be granted pursuant to that provision unless new evidence, if presented originally, would have, with reasonable certainty, changed result. Rules Civ.Proc., Rule 60.02(f).

2. Criminal Law (key) 998(10)

Indication by Commonwealth's medical expert in homicide prosecution that portions of his testimony in defendant's trial could have been erroneous did not warrant post-conviction relief under rule providing for relief for "any other reason of an extraordinary nature justifying relief," as inclusion of expert's misgivings in evidence, or exclusion of his testimony from original trial altogether, would not, with reasonably certainty, have altered outcome; on cross-examination, expert admitted that his particular blood analysis was novel, and that he did not know whether blood found on defendant's boots belonged to victim or to third party, and neither defense counsel nor prosecutor even referred to expert or his testimony in closing argument. Rules Civ.Proc., Rule 60.02(f).

3. Criminal Law (key) 998(10)

While there is danger that expert witness' testimony can be given undue weight by jury, and court determining whether to grant postconviction relief under rule providing for relief for "any other reason of extraordinary nature justifying relief" must be sensitive to possible injustice of convicting

and incarcerating, on basis of discredited expert testimony, man who might be innocent, court nevertheless must not underestimate jury's intelligence in its ability to discern between multitude of evidence and testimony presented to it and to evaluate such accordingly. Rules Civ.Proc., Rule 60.02(f).

4. Criminal Law (key) 1147

Judgment of judge who denied postconviction relief under rule providing

for relief for "any other reason of an extraordinary nature justifying relief" would be afforded deference under abuse-of-discretion standard of review, particularly as judge had presided over defendant's trial, saw prosecution's medical expert testify, and was thus in excellent position to evaluate import of expert's testimony, which defendant had attempted to discredit on motion for postconviction relief. Rules Civ.Proc., Rule 60.02(f).

5. Criminal Law (key) 998(19)

Trial court did not abuse its discretion in declining to hold evidentiary hearing on motions for postconviction relief, as court accepted as true all of factual allegations made by movant regarding prosecution's medical expert's misgivings about his trial testimomy. Rules Civ.Proc., Rule 60.02(f).

Gail Robinson, Kevin McNally, McNally & Robinson, Frankfort, for appellant.

A.B. Chandler, III, Attorney General, Todd D. Ferguson, Assistant Attorney General, Frankfort, for appellee.

KEVIN HABLE, Special Justice.

Appellant, James Brown, appeals the denial by the Mason Circuit Court of his motion made pursuant to CR 60.02(f) to set aside his conviction. The Court of Appeals affirmed the denial of Appellant's motion. For the reasons set forth below, we affirm the order of the trial court and the Court of Appeals.

Appellant and his brother, Mark Brown, in separate trials, were convicted in 1976 of the murder of Bryant Dudley and each conviction was appealed. This Court affirmed the conviction of Mark Brown in *Brown v. Commonwealth*, Ky., 555 S.W.2d 252

(1977). Although this Court found no reversible errors in the trial of Appellant, the Court remanded to the trial court to comply with the presentencing requirements set forth in KRS 532.050. *Brown v. Commonwealth*, Ky., 639 S.W.2d 758 (1982), *cert. denied*, 460 U.S. 1037, 103 S.Ct. 1428, 75 L.Ed.2d 788 (1983).

Appellant, who was apparently free on bond during the pendency of his appeal, fled to Australia, where he lived for several years. Although the record is not clear on this matter, Appellant apparently was extradited and was sentenced in 1993 to twenty years imprisonment. In 1993, Appellant filed a motion pursuant to CR 60.02(f) to set aside his conviction because the Commonwealth's expert witness in Appellant's trial indicated to defense counsel that portions of his testimony could have been erroneous. The trial court

denied that motion. Thus the appeal.

This Court set forth a detailed description of the evidence in this case in *Brown,* 639 S.W.2d at 759-60. Therefore, a summary will suffice for our purposes.

Mark Brown believed that the victim, Dudley Bryant, had broken into Mark's home and stolen drugs from him. Mark Brown and Appellant took the victim for a ride in Appellant's car on the evening of May 17, 1976, during which time Mark Brown questioned the victim about the drug theft while brandishing a handgun. The following night, May 18, 1976, Mark Brown and Appellant stopped by the victim's girlfriend's house, where they found the victim. The victim left with the Brown brothers in Appellant's car and went to Mark Brown's home. Four visitors to Mark Brown's home saw Mark Brown, Appellant and the victim there together. The visitors

were told that Mark Brown and Appellant were planning to go to Lexington later that night.

The Brown brothers travelled to Lexington later that night, where they spent the night with friends. The next day, Mark went to Appellant's car and fired a shotgun, allegedly to test the shotgun's safety mechanism. Later that day, May 19, 1976, Appellant traded his boots to one of his Lexington friends. Those boots were stained with Type A blood, the blood type of Appoellant and the victim.

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A few days later, Mark Brown called a friend, Robert Collins, in Mason County, and asked Collins to help him locate and bury the victim's body. Mark Brown took Collins to Morton's Lane in Mason County and told Collins that the Morton's Lane

area is where "they" had shot the victim. Mark Brown and Collins did not find the body.

Afterwards, the police did find the body off Morton's Lane. Death was caused by two wounds in the back from a side-by-side shotgun. A police witness at Appellant's trial testified that the wound was inflicted by a No. 6 shot fired from a .12 gauge shotgun. The witness identified the shotgun-shell wadding as having come from Federal brand shotgun shells.

The evidence also showed that Appellant owned a side-by-side, double-barrelled Stevens .12 gauge shotgun, which had a defective safety mechanism. Authorities recovered Federal .12 gauge, No. 6 shot shotgun shells from Appellant's mother's house, where he resided. Tire marks similar to the tires on Appellant's car were found near the victim's body.

In addition to the above-described evidence, the Commonwealth produced expert testimony at Appellant's trial. Dr. Robert Shaler studied blood samples and concluded that based on the presence or absence of specific genetic markers in the samples, that the blood found on Appellant's boots was found in only 4.6% of the population and could not have been the blood of Appellant. Dr. Shaler did not testify that the blood on the boots belonged to the victim and he did not rule out the possibility that the blood stain could have been the blood of a third person. Furthermore, the defense presented no evidence at trial that the blood stain on the boots was Appellant's.

Defense counsel interviewed Dr. Shaler in 1993. At that time, according to the affidavit of defense counsel, Dr. Shaler indicated that he was mistaken in assert-

ing that the blood stain on the Appellant's boots could not have belonged to Appellant. The affidavit formed the basis for Appellant's motion pursuant to Rule 60.02(f) to vacate his conviction. The trial court declined to hold an evidentiary hearing but assumed defense counsel's affidavit to be a true reflection of Dr. Shaler's thinking about his earlier testimony. The trial court denied Appellant's motion because "the exclusion of the testimony of ... Shaler would in all probability not have affected the verdict of the jury." The court noted that "[i]n view of the overwhelming evidence, Shaler's testimony was not crucial to the Commonwealth's case."

The Court of Appeals affirmed, citing among other things, the prior appeal of Appellant to this Court. In 1982, this Court ruled that Dr. Shaler's testimony

was admissible in Appellant's trial. The Court stated that questions raised on appeal surrounding the testimony related to the credibility and weight of the testimony rather than its admissibility. *Brown,* 639 S.W.2d at 760. In discussing the evidence, the Court noted the evidence summarized above, *without Dr. Shaler's testimony,* "was sufficient to justify the conviction of Jim Brown...." *Id.*

Notwithstanding the earlier ruling, Appellant now attempts to characterize Dr. Shaler as the key witness against him and suggests that Shaler's testimony had a "scientific aura," which might have led the jury to accept it without doubt or question.

Rule 60.02(a) through (e) provides that "a court may, upon such terms as are just, relieve a party ... from its final judgment, order or proceeding" if one or

more of several circumstances are present, including: mistake, inadvertence, surprise or excusable neglect; newly discovered evidence that could not, with due diligence, have been discovered in time to move for a new trial; perjury; fraud affecting the proceedings; the judgment being void, satisfied, released, discharged or overturned. Subsection (f) of CR 60.02 also provides for relief for "any other reason of an extraordinary nature justifying relief."

Generally, CR 60.02(f) stands in the place of the ancient writ of *coram nobis*. To have a judgment set aside in a *coram nobis* proceeding, a petitioner had to convince the court that "the real facts as later presented on application for the writ, rendered the original trial tantamount to none at all, and [enforcement of] the judgment as rendered

would be an absolute denial of justice and analogous to the taking of life or property without due process of law." *Jones v. Commonwealth*, 269 Ky. 779, 108 S.W.2d 816, 817 (1937), cited in *Gross v. Commonwealth*, Ky., 648 S.W.2d 853, 855 (1983). In *Gross*, this Court made it clear that Rule 60.02 did not extend the scope of remedies available under *coram nobis* or add new grounds of relief. *Gross* at 856.

[1,2] This Court has held that actions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Richardson v. Bruner*, 327 S.W.2d 572, 574 (1959). Rule 60.02(f) "may be invoked only under the most unusual circumstances ..." *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (1963);

see also, Cawood v. Cawood, 329 S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. *See, Wallace v. Commonwealth,* 327 S.W.2d 17 (1959). A review of the evidence at Appellant's trial fails to convince us that the outcome would have been different if all of Dr. Shaler's testimony had been excluded or if it had been admitted and Shaler's later misgivings had been available to the jury at the time of trial.

As the summary of the evidence shows, there was ample circumstantial evidence in the record upon which the jury could have based its verdict. Indeed, as noted above, this Court has earlier concluded that the evidence at trial, absent the testimony of Shaler, was sufficient to convict Appel-

lant Brown, *supra* at 760.

Moreover, when Dr. Shaler's testimony (the testimony on direct examination) is taken as a whole, it is clear that Dr. Shaler's testimony was not the key piece of evidence against Appellant. Indeed, it appears not to have been an important item of evidence.

Dr. Shaler was subjected to intrepid and effective cross-examination by defense counsel. On cross-examination, Dr. Shaler admitted that his particular blood analysis was novel and that it had been accedpted as expert evidence in only one other homicide case in the United States (and that case involved Dr. Shaler himself as the expert witness). Shaler had testified that only 4.6% of the nation's population had the particular blood markers found by him in the sample he studied. Defense counsel elicited from

Shaler the admission that he had based this conclusion on a *county-wide* population survey in *Pennsylvania*. Dr. Shaler also admitted during cross-examination that he did not know whether the blood found on Appellant's boots belonged to the victim. Shaler also conceded that the blood could have belonged to a third party. Moreover, Dr. Shaler, during cross-examination, stated that he had conducted testing with respect to only three blood antigens, when there are as many as 23 separate blood antigens that can be analyzed.

Appellant's contention that Dr. Shaler was the key witness against Appellant is severely undermined by the conduct of counsel who defended Appellant at trial and of the Commonwealth Attorney who prosecuted the case. Neither even referred to Dr. Shaler or his testimony in closing

argument to the jury.

[3] Of course, there is a danger that expert witness testimony can, on occasion, be given undue weight by a jury. Likewise, this Court must be sensitive to the possible injustice of convicting and incarcerating on the basis of descredited expert testimony, a man who might be innocent. Nevertheless, "we must not underestimate a jury's intelligence in its ability to discern between the multitude of evidence and testimony presented to it and to evaluate such accordingly." *Turner v. Commonwealth*, Ky., 914 S.W.2d 343, 347 (1996).

[4,5] We note also that the judge who denied Appellant's Rule 60.02(f) motion in 1993 presided over Appellant's trial in 1976. He saw Dr. Shaler testify at trial and was thus in an excellent position to evaluate the import of Shaler's testimony.

His judgment should be afforded deference under the abuse-of-discretion standard of review. Nevertheless, even if one disagrees with his conclusion that the other evidence in the case was "overwhelming," it is obvious that the inclusion of Dr. Shaler's misgivings in the

evidence or the exclusion of Dr. Shaler's testimony from the original trial altogether would not, with reasonable certainty, have altered the outcome. Therefore, the order of the trial court, and the opinion of the Court of Appeals are affirmed.[1]

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1. Appellant also contends that the trial court erred in failing to conduct an evidentiary hearing concerning his Rule 60.02(f) motion. The trial court, however, accepted as true all of the factual allegations made by Appellant regarding Dr. Shaler's misgivings about his earlier testimony. Thus, the trial court did not abuse its discretion

GRAVES, WINTERSHEIMER, JJ., and C. MICHAEL REYNOLDS, S.J.J., concur.

JACKSON WHITE, S.J., dissents by separate opinion, with LAMBERT and STUMBO, J.J., joining with dissent.

JACKSON W. WHITE, Special Judge, dissenting.

I must respectfully dissent.

I am persuaded that the proper standard of review of the CR 60.02(f) motion includes a determination of whether there was a fundamental miscarriage of justice in the trial and conviction of James E. Brown, III for wanton murder. The majority of this Court focuses solely upon the sufficiency of other incriminating evidence to uphold the conviction. However, this approach fails to assess the probable impact of the recanted testimony of Dr. Robert Shaler upon the constitu-

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in declining to hold an evidentiary hearing.

tional right of Mr. Brown to a fair trial. I am convinced that James Brown suffered substantial injustice of an "extraordinary nature" as contemplated by CR 60.02(f) and the judgment of conviction should be vacated.

The trial court characterized the evidence against James Brown as "overwhelming" and concluded that the exclusion of Dr. Shaler's testimony "would in all probabhility not have affected the verdict of the jury." The basis of this determination by the trial court was that Mark Brown, James Brown's brother, was convicted on the same testimony introduced in James Brown's trial without the testimony of Dr. Shaler. The exception the trial court found was that "in the Mark Brown case the admissions of Mark Brown were introduced in full whereas in the James Brown case the admissions were lim-

ited to Mark Brown's inability to find the body ...."

The trial court was clearly erroneous in this characterization of the evidence against James and Mark Brown. In Mark Brown's appeal of his conviction, this Court noted that the evidence against Mark Brown was "abundant." *Brown v. Commonwealth*, Ky., 555 S.W.2d 252, 256 (1977). We made no such determination in our decision in James Brown's case. *Brown v. Commonwealth*, Ky., 639 S.W.2d 758 (1982). Most importantly, "Mark was done in by the testimony of Robert Collins, who said that Mark had confided in him and admitted that he and Jim had killed Dudley." *Brown v. Commonwealth*, Ky., 639 S.W.2d 758, 759 (1982). There was no such testimony in James Brown's case.

Both the majority of this Court and the trial court refer to the testimony of

Robert Collins as additional evidence against James Brown. Collins attributed a statement to Mark Brown that implicated James Brown in the murder. However, this statement was clearly inadmissible, and we so indicated in our original opinion: "This evidence, of course, was not admissible against Jim." *Brown v. Commonwealth*, Ky., 639 S.W.2d 758, 759 (1982).

The Court of Appeals merely relied upon this Court's earlier determination that there was sufficient evidence to sustain James Brown's conviction without Dr. Shaler's testimony. Likewise, the majority of this Court places great emphasis on our previous determination of the sufficiency of the evidence against James Brown: "In discussing the evidence, the Court noted the evidence summarized above, *without Dr. Shaler's testimony,* 'was sufficient to

justify the conviction of Jim Brown ....' Majority Opinion at p. 361.

The question now before us is no longer the *sufficiency* of the evidence absent Dr. Shaler's testimony or whether "there was ample circumstantial evidence in the record on which the jury *could* have based its verdict." Majority Opinion, p. 361 (emphasis added). Rather, the question is the likeli-

hood that this highly persuasive scientific evidence at the original trial changed the result. Our previous determination regarding the sufficiency of the evidence means only that if James Brown's conviction were vacated, there is sufficient evidence for him to be retried.

The survival of the common law writ of coram nobis for relief in a criminal case through civil code provisions was consid-

ered by this Court in *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48 (1943). In that case, the Court reviewed the denial of a motion presented by one of three men sentenced to die from the infamous Marian Miley murder trial in the Fayette Circuit Court. This Court determined the petition disclosed "that there may have been a miscarriage of justice." *Id.*, 168 S.W.2d at 54.

At the trial, two of the accused testified that movant Anderson particiapted in the brutal murders of a young Lexington Country Club golf pro and her mother during the course of a burglary of their apartment at the club. In a deposition filed with the motion seeking a writ of coram nobis, Penney, one of the condemned men, claimed to have taken and used Andersons' automobile on the fateful night without Anderson's knowledge or con-

sent. Penney testified that in perpetrating the crime he was accompanied by a man named Stewart, not by Anderson as he had previously sworn at the trial. Another condemned man, Baxter, avowed in his deposition accompanying the motion that he could not say it was Anderson he saw with Penney the night of the murder, contradicting his positive identification of Anderson at trial.

Apart from the positive identification and implication of Anderson in the commission of the murders by the convicted perpetrators, Penney and Baxter, the remaining evidence bears a remarkable resemblance to the other incriminating evidence against James E. Brown, III:

> Anderson: The pistol from which the fatal bullet was fired belonged to Anderson.
>
> Brown: The victim was killed by two simultaneous shotgun blasts from Federal brand shells; Brown owned a

double-barrelled shotgun with a defective safety capable of firing simultaneous shots and Federal shells were found at the home of Mr. Brown's mother, where Mr. Brown lived.

Anderson: A witness identified Anderson as looking for Baxter on the fatal night.

Brown: The victim was last seen alive in the home of Mark Brown, where both Mark and James Brown were present.

Anderson: Anderson and Penney were sighted together in Anderson's car which Anderson was seen driving on the night of the murders.
Brown: On two different occasions, the victim accompanied Mark Brown in an automobile owned and driven by James Brown; tire prints near the scene were similar to the tires of this automobile.

Anderson: Anderson did not take the stand to deny any of the testimony against him.

Brown: Brown did not take the stand to deny any of the testimony against him.

The trial court erroneously characterized this evidence against James Brown as "over-whelming." Conversely, the

majority of the *Anderson* Court characterized the sufficiency of the evidence to convict in that case as "problematical" and held:

> The court in which a conviction was had has discretion to grant the writ where it appears that but for alleged false testimony or undiscovered evidence of such a conclusive character that the verdict *most probably* would not have been rendered and there is a *strong probability* of a miscarriage of justice unless the process be granted ....
>
> . . . . . .
>
> The question of the guilt or innocence of the accused is not a necessary subject of the inquiry.

Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48, 53-54 (1943).

I do not believe that a jury would have found James Brown guilty of murder beyond a reasonable doubt without the following testimony of Dr. Robert Shaler:

> Q: The blood from the suspect [James Brown] matched the blood on the boots?

A: No sir. The blood from the victim matches that which is on the boot, as far as the GM blood typing is concerned.

Q: From your GM blood typing sir, was it possible that the blood on the boot was the blood of James Brown, the defendant?

A: *It is impossible.*

Q: Is it possible that it was the blood of Bryant Dudley, the victim?

A: It is possible.

Q: What percentage of the population has the blood consistent with the blood of the victim?

A: ... [T]his particular blood occurs in about 4.6, approximately 4.6 percent of the population.

An "aura of special reliability and trustworthiness," surrounds scientific or expert testimony in the eyes of a jury, especially within the context of a criminal trial. *Hester v. Commonwealth*, Ky., 734 S.W.2d 457 (1987) (citation omit-

ted). Dr. Shaler positively excluded James Brown as the source of the blood stain on James Brown's suspicious boot and, as the Majority Opinion fails to mention, just as positively identified the victim, Bryant Dudley, as one of about four sources in a hundred candidates. For this jury in this trial, there were only two relevant sources of the relatively rare blood: James E. Brown, III and Bryant Dudley. According to Dr. Shaler, it was impossible that the blood came from James Brown and the odds that it came from Bryant Dudley were high. Dr. Shaler's unequivocal exclusion of James Brown as the blood source provided a compelling link connecting James Brown to the brutal murder of Bryant Dudley.

I strongly disagree with the majority that "it is clear that Dr. Shaler's testimony was not the key piece of evi-

dence against Appellant. Indeed, it appears not to have been an important item of evidence." On appeal of James Brown's conviction, this Court equated the evidence at issue here, Dr. Shaler's testimony regarding the blood on James Brown's boots, to testimony in Mark Brown's trial that Mark Brown had admitted he killed Bryant Dudley:

> Mark was done in by the testimony of Robert Collins, who said that Mark had confided in him and admitted that he and Jim had killed Dudley. This evidence, of course, was not admissible against Jim. In Jim's trial, on the other hand, there was expert evidence that blood found on Jim's boots was not his blood but could have been Dudley's. That evidence was not introduced in Mark's trial.

Brown v. Commonwealth, Ky., 639 S.W.2d 758, 759 (1982). Evidence equivalent to an admission of guilt is by no means unimportant.

I also disagree with the majority's

conclusion that Dr. Shaler's role in the conviction of James Brown was not significant because neither his counsel nor the prosecutor referred to the witness or his testimony in closing argument. Throughout these proceedings, James Brown and his counsel have treated the testimony as significant. At trial, counsel for James Brown requested a continuance when Dr. Shaler was called as the last witness for the prosecution. James Brown's counsel challenged this evidence in the former appeal. Indeed, the principal contention urged for reversal of the conviction in the earlier appeal focused on the admissibility of this evidence. Counsel for James Brown even sought a writ of certiorari from the United States Supreme Court on this very issue. *Brown v. Commonwealth,* 460 U.S. 1037, 103 S.Ct. 1428, 75 L.Ed.2d 788 (1983).

In closing argument, defense counsel strategically avoided a direct attack on the "blood" evidence:

> [T]hen one other thing, blood, that seems to be the big thing in this trial, the blood. Now if Jimmy Brown killed a man with a shotgun, drug his body up over an embankment, wouldn't there be more blood on him than the little bit on his shoes?

On the other hand, the prosecutor skillfully pointed to this testimony in his closing:

> Ladies and gentlemen, the reason he [James Brown] wanted to trade boots was because his boots had Bryant Dudley's blood on them ....

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> There is no use mentioning all of the other one out of 25 people [approximately 4.6%] who had the blood that Bryant Dudley had was found on Jim Brown's boots.

For the majority to conclude that the erroneous expert testimony of Dr. Shaler, offering the only direct evidence connecting James Brown to the murder of

Bryant Dudley, was an insignificant factor in his conviction substitutes judicial clairvoyance for a fair and impartial trial by jury on reliable evidence.

LAMBERT and STUMBO, J.J., join this dissent.

(West Key Number System)

97-6355/6425

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES H. BROWN, III *Petitioner-Appellant/* *Cross-Appellee,* v. MICHAEL O'DEA, Warden, Eastern Kentucky Correctional Complex, *Respondent-Appellee/* *Cross-Appellant.*	)	Filed Oct 26, 1999, Leonard Green, Clerk **ORDER**

BEFORE: MERRITT and MOORE, Circuit Judges; and DUGGAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

"s Leonard Green"

Leonard Green, Clerk

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*Hon. Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9. Powers denied Congress

Second Clause

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Third Clause

No Bill of Attainder or ex post facto Law shall be passed.

Article III

Sections 1. Judicial power

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. Extent of judicial power; Supreme Court; Time and places of trial.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public

Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may be Law have directed.

28 U.S.C. §2244. Finality of determination.

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (4)(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State

court. The limited period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(4)(d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2254. State custody; remedies in Federal courts.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.